274 N.C. App.—No. 2 Pages 158-250

ADVANCE SHEETS

OF

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

JULY 29, 2021

MAILING ADDRESS: The Judicial Department
P. O. Box 2170, Raleigh, N. C. 27602-2170

THE COURT OF APPEALS
OF
NORTH CAROLINA

Chief Judge

LINDA M. McGEE[1]

DONNA S. STROUD[2]

Judges

WANDA G. BRYANT[3]
CHRIS DILLON
RICHARD D. DIETZ
JOHN M. TYSON
LUCY INMAN
VALERIE J. ZACHARY
PHIL BERGER, JR.[4]
HUNTER MURPHY
JOHN S. ARROWOOD

ALLEGRA K. COLLINS
TOBIAS S. HAMPSON
REUBEN F. YOUNG[5]
CHRISTOPHER BROOK[6]
JEFFERY K. CARPENTER[7]
APRIL C. WOOD[8]
W. FRED GORE[9]
JEFFERSON G. GRIFFIN[10]
DARREN JACKSON[11]

Former Chief Judges

GERALD ARNOLD
SIDNEY S. EAGLES, JR.
JOHN C. MARTIN

Former Judges

WILLIAM E. GRAHAM, JR.
J. PHIL CARLTON
BURLEY B. MITCHELL, JR.
WILLIS P. WHICHARD
CHARLES L. BECTON
ALLYSON K. DUNCAN
SARAH PARKER
ELIZABETH G. McCRODDEN
ROBERT F. ORR
JACK COZORT
MARK D. MARTIN
JOHN B. LEWIS, JR.
CLARENCE E. HORTON, JR.
JOSEPH R. JOHN, SR.
ROBERT H. EDMUNDS, JR.
JAMES C. FULLER
K. EDWARD GREENE
RALPH A. WALKER
ALBERT S. THOMAS, JR.
LORETTA COPELAND BIGGS

ALAN Z. THORNBURG
PATRICIA TIMMONS-GOODSON
ROBIN E. HUDSON
ERIC L. LEVINSON
JAMES A. WYNN, JR.
BARBARA A. JACKSON
CHERI BEASLEY
CRESSIE H. THIGPEN, JR.
ROBERT C. HUNTER
LISA C. BELL
SAMUEL J. ERVIN, IV
SANFORD L. STEELMAN, JR.
MARTHA GEER
LINDA STEPHENS
J. DOUGLAS McCULLOUGH
WENDY M. ENOCHS
ANN MARIE CALABRIA
RICHARD A. ELMORE
MARK A. DAVIS
ROBERT N. HUNTER, JR.

[1]Retired 31 December 2020. [2]Appointed Chief Judge 30 December 2020 and sworn in 1 January 2021. [3]Retired 31 December 2020.
[4]Resigned 31 December 2020. [5]Term ended 31 December 2020. [6]Term ended 31 December 2020. [7]Sworn in 1 January 2021.
[8]Sworn in 1 January 2021. [9]Sworn in 1 January 2021. [10]Sworn in 1 January 2021. [11]Appointed 30 December 2020 and sworn in 6 January 2021.

Clerk
DANIEL M. HORNE, JR.

Assistant Clerk
Shelley Lucas Edwards

OFFICE OF APPELLATE DIVISION STAFF

Director
Jaye E. Bingham-Hinch

Assistant Director
David Alan Lagos

Staff Attorneys
Bryan A. Meer
Michael W. Rodgers
Lauren M. Tierney
Caroline Koo Lindsey
Ross D. Wilfley
Hannah R. Murphy
J. Eric James

ADMINISTRATIVE OFFICE OF THE COURTS

Director
McKinley Wooten[12]
Andrew Heath[13]

Assistant Director
David F. Hoke

OFFICE OF APPELLATE DIVISION REPORTER

Alyssa M. Chen
Jennifer C. Peterson
Niccolle C. Hernandez

[12]Resigned 7 January 2021. [13]Appointed 8 January 2021.

COURT OF APPEALS

CASES REPORTED

FILED 3 NOVEMBER 2020

CASES REPORTED WITHOUT PUBLISHED OPINIONS

HEADNOTE INDEX

ADMINISTRATIVE LAW

State employee grievance proceeding—deadline to commence contested case—more specific statute controls—An administrative law judge erred by dismissing a state employee's contested case as untimely under N.C.G.S. § 150B-23(f), which states that the time to file a contested case begins when "notice is given," which occurs once an agency places its final decision in the mail. Although section 150B-23(f) is a general statute that applies to all contested case proceedings, the more specific statute in the North Carolina Human Resources Act—N.C.G.S. § 126-34.02(a), which governs employee grievance and disciplinary actions—governed this case, and petitioner complied with the statute by filing the case within thirty days "of receipt" of the final agency decision. **Krishnan v. N.C. Dep't of Health & Hum. Servs., 170.**

APPEAL AND ERROR

Interlocutory appeal—public official immunity—personal jurisdiction—substantial right—In an interlocutory appeal from the trial court's denial of defendant's motions to dismiss under Civil Procedure Rules 12(b)(1), 12(b)(2), and 12(b)(6) based upon a claim of public official immunity from a libel claim (since defendant

worked as the city manager), the Court of Appeals dismissed defendant's appeal from the order denying his Rule 12(b)(1) motion to dismiss because the denial did not affect a substantial right or constitute an adverse ruling to personal jurisdiction. The Court allowed defendant's appeal from the denial of his Rule 12(b)(2) and 12(b)(6) motions to dismiss because the denial of the Rule 12(b)(2) motion based on sovereign immunity constituted an immediately appealable adverse ruling on personal jurisdiction and the denial of the Rule 12(b)(6) motion based on sovereign immunity was immediately appealable since it affected a substantial right. **Green v. Howell, 158.**

Preservation of issues—driving while impaired—pretrial motion to suppress—failure to object at trial—failure to argue plain error—In a driving while impaired case, defendant failed to preserve for appellate review her argument that the trial court erroneously denied her pretrial motion to suppress for lack of reasonable suspicion for the stop where she did not object to the court's ruling, did not object to the evidence at trial, and failed to argue plain error on appeal. Therefore, the argument was dismissed. **State v. McGaha, 232.**

Preservation of issues—failure to object—sentencing—claim that sentence invalid as a matter of law—Where defendant was convicted of insurance fraud and obtaining property by false pretenses and did not object to her sentence at trial, her arguments that the trial court erred by imposing sentences on both offenses based on the same misrepresentation and improperly delegated authority to her probation officer by failing to set a completion deadline for the active term of her split sentence were reviewable on appeal. Because defendant alleged the trial court erred by imposing a sentence that was invalid as a matter of law, her arguments were preserved for appellate review despite her failure to object on that basis at sentencing. **State v. Ray, 240.**

ARBITRATION AND MEDIATION

Motion to compel arbitration—assignment of right to arbitrate—purchaser of credit card debts—In a class action against defendant-business, which obtained default judgments against the named plaintiffs after purchasing their credit card debts through bills of sale, the trial court properly denied defendant's motion to compel arbitration because no valid arbitration agreement existed between the parties where the original creditors did not assign defendant the right to arbitrate. The state laws governing plaintiffs' credit card agreements (Utah and South Dakota) required an express intent to specifically assign arbitration rights, which the bills of sale failed to demonstrate by only assigning plaintiffs' "accounts" and "receivables" and by not including language assigning "all" of the creditors' rights to defendant. **Pounds v. Portfolio Recovery Assocs., LLC, 201.**

ATTORNEY FEES

Criminal case—civil judgment—notice and opportunity to be heard—A civil judgment for attorney fees entered after defendant was convicted of first-degree burglary was vacated and the matter remanded to the trial court. Defendant was deprived of a meaningful opportunity to be heard before the judgment was entered because even though she stated she had no objection after being informed that a judgment would be entered and what her appointed counsel's hourly fee was, she was not yet aware of the number of hours her counsel planned to submit or the total amount she would owe when she gave her agreement. **State v. Bowman, 214.**

PUBLIC OFFICERS AND EMPLOYEES

and obtaining property by false pretenses based on the same misrepresentation to the insurance company, the trial court did not err in sentencing defendant on both offenses because the language, subject, and history of the statutes involved showed a legislative intent to impose multiple punishments. Each offense required an element not required by the other, each offense addressed a violation of a separate and distinct social norm, and the Court of Appeals had sustained sentencing for convictions of both insurance fraud and obtaining property by false pretenses in numerous cases over the years, and if that had not been the intent of the legislature, it could have addressed the matter. **State v. Ray, 240.**

Probation—split sentence—failure to set completion deadline for active sentence—Where defendant was convicted of insurance fraud and obtaining property by false pretenses and the trial court sentenced her to serve 24 months of supervised probation with a condition that she serve a 60-day active sentence in two 30-day terms as scheduled by her probation officer, the trial court did not err or unlawfully delegate its authority to the probation officer by failing to set a completion deadline for the active sentence. The trial court properly determined the time and intervals within the period of probation (the two thirty-day periods) as allowed by N.C.G.S. § 15A-1351(a), and the completion date was set by statute—the end of the probationary period or no more than two years from the date of defendant's conviction. **State v. Ray, 240.**

STATUTE OF FRAUDS

Mediated settlement agreement—parties' signatures required—"parties" defined—Where the parties to a lawsuit participated remotely in a mediated settlement conference in which their attorneys signed a settlement agreement on their behalf, and where plaintiff eventually signed the agreement but defendant refused to do so, an order granting plaintiff's motion to enforce the agreement was reversed because the agreement failed to satisfy the applicable statute of frauds (N.C.G.S. § 7A-38.1(*l*)), which requires a mediated settlement agreement to be "signed by the parties against whom enforcement is sought." The language of section 7A-38.1(*l*) was unambiguous, and the plain meaning of the word "parties" did not include the parties' attorneys or other agents. **Mitchell v. Boswell, 174.**

UNIFORM COMMERCIAL CODE

Assignment of credit card debt—Section 9-404—right to compel arbitration—not included—Where defendant-business purchased plaintiffs' credit card debts through bills of sale that did not expressly assign the original creditors' arbitration rights (under the credit card agreements) to defendant, Section 9-404 of the Uniform Commercial Code (U.C.C.)—providing that an assignee's rights are subject to all terms of the agreement between an account debtor and assignor—did not grant defendant a statutory right to arbitrate plaintiffs' consumer protection claims against it. Even if Section 9-404 applied to this case, the U.C.C. allows parties to vary its terms by agreement, and the bills of sale contractually limited the scope of the assignments to include only plaintiffs' accounts and receivables. **Pounds v. Portfolio Recovery Assocs., LLC, 201.**

SCHEDULE FOR HEARING APPEALS DURING 2021

NORTH CAROLINA COURT OF APPEALS

Cases for argument will be calendared during the following weeks:

January 11 and 25

February 8 and 22

March 8 and 22

April 12 and 26

May 10 and 24

June 7

August 9 and 23

September 6 and 20

October 4 and 18

November 1, 15, and 29

December 13

Opinions will be filed on the first and third Tuesdays of each month.

GREEN v. HOWELL

[274 N.C. App. 158 (2020)]

WILLIE A. GREEN, SR., PLAINTIFF
v.
RICK HOWELL (INDIVIDUALLY), DEFENDANT

No. COA20-204

Filed 3 November 2020

1. Appeal and Error—interlocutory appeal—public official immunity—personal jurisdiction—substantial right

In an interlocutory appeal from the trial court's denial of defendant's motions to dismiss under Civil Procedure Rules 12(b)(1), 12(b)(2), and 12(b)(6) based upon a claim of public official immunity from a libel claim (since defendant worked as the city manager), the Court of Appeals dismissed defendant's appeal from the order denying his Rule 12(b)(1) motion to dismiss because the denial did not affect a substantial right or constitute an adverse ruling to personal jurisdiction. The Court allowed defendant's appeal from the denial of his Rule 12(b)(2) and 12(b)(6) motions to dismiss because the denial of the Rule 12(b)(2) motion based on sovereign immunity constituted an immediately appealable adverse ruling on personal jurisdiction and the denial of the Rule 12(b)(6) motion based on sovereign immunity was immediately appealable since it affected a substantial right.

2. Immunity—public official immunity—city manager—malicious conduct—motion to dismiss

In a libel action, the trial court erred by denying defendant's Civil Procedure Rule 12(b)(2) motion to dismiss based on public official immunity where defendant was acting in his capacity as city manager and plaintiff failed to sufficiently allege facts showing that defendant's acts were malicious or corrupt. The complaint, filed after the city rejected plaintiff's proposal for a public-private partnership to build a sports complex, did not allege any false statements made by defendant. Defendant's expression of his opinions that plaintiff did not have the financial resources to build a sports complex and wanted to build the complex using public funds were statements made under defendant's authority and responsibility to exercise his judgment and discretion in discussions with the city council and were presumed to have been made in good faith where plaintiff failed to allege facts to the contrary.

Appeal by Defendant from order entered 13 January 2020 by Judge Todd Pomeroy in Cleveland County Superior Court. Heard in the Court of Appeals 26 August 2020.

The Freedmen Law Group, by Desmon L. Andrade, for Plaintiff-Appellee.

Stott, Hollowell, Palmer & Windham, L.L.P., by Martha Raymond Thompson, for Defendant-Appellant.

COLLINS, Judge.

Defendant Rick Howell appeals from the trial court's order denying his motion to dismiss the complaint filed against him. Defendant contends he is entitled to public official immunity because he was acting as a city manager in the performance of his official duties, and Plaintiff's allegations of malice or corruption are insufficient to bar immunity. We reverse the trial court's order.

I. Background

Willie A. Green, Sr. ("Plaintiff"), commenced this action on 31 October 2019 by filing a complaint against Rick Howell ("Defendant"), in his individual capacity, alleging libel per se and seeking compensatory and punitive damages. Plaintiff alleged the following relevant facts in his complaint:

> 4. [Plaintiff] has served in a leadership capacity in the community for the duration of his residency . . . .
>
> 5. [Plaintiff was] a Nine-year NFL veteran [and] the Chief Executive Officer and President of 5-Star . . . .
>
> 6. [Plaintiff has had] a successful career in the business and corporate sectors . . . [and] obtained his master's degree in Sport[s] Administration . . . .
>
> . . . .
>
> 8. [In] 2016, [Plaintiff] met with the Mayor . . . and . . . [Defendant] (City Manager) to discuss the prospects of a potential Public Private Partnership between 5-Star and the City of Shelby . . . .
>
> 9. [T]he Mayor and Defendant . . . [were] well aware of [Plaintiff's] accomplishments as a professional athlete and as a businessman as both facts were well documented in

local publications and evidenced by his other successful business ventures within the community . . . .

. . . .

12. Over the span of approximately two years and as the result of numerous written and in person communications between [Plaintiff], the Mayor and [Defendant] several proposals were funded by [Plaintiff] . . . .

13. [Plaintiff] hired a sports advisory firm to provide an initial proposal to [Defendant] and the same was completed and delivered on approximately June 4, 2016. This proposal was concluded with an inquiry of whether [Defendant] would like to proceed with discussions on what the city would be able to provide. This inquiry was answered in the affirmative.

14. [Plaintiff] use[d] personal capital and assets of investors [to] expend[] extensive resources, including but not limited to the purchase of 16.68 acres of land as to decrease the strain on city resources in furtherance of a partnership in its most literal interpretation.

15. Subsequently, [Plaintiff] provided a new proposal which included a "location solution" by bringing privately owned land to the table while still operating within the confines of the proposals advanced by [Defendant].

16. On approximately July 6, 2017, this proposal was rejected and new and unfounded basis for said rejection were given to [Plaintiff], leaving him surprised and confused.

17. At this point it became apparent that this process that was promised to be open and in good faith was being handled in an opposite fashion.

18. Still attempting to salvage the once promising partnership and all the historical implications that came therewith [Plaintiff] again in good faith altered his plans and in November of 2017 reopened discussions regarding how to make the sports facility work on the property of Holly Oak Park.

19. On approximately January 24, 2018, [Plaintiff] met with the Mayor and [Defendant] and continued discussions regarding the partnership at Holly Oak Park.

20. Between January 29, 2018, and February 4, 2018, email correspondences confirmed the January 24, 2018, meeting between [Plaintiff], the Mayor and [Defendant] and furthermore evidenced the continued assurances of optimism from [Defendant] who stated in pertinent part[,] "The concept that you presented to the Mayor and I is exciting and we are hopeful that your business is successful in making the sports complex a reality . . . "

21. During this same communication chain, [Defendant] indicated that all proposals would be subject to the scrutiny of City Council in an "open process" and that "City Council will make the final decision."

22. Through the retention of communications from [Defendant] to City Council it is clear that [Plaintiff] was given promises of a thorough and open vetting process while [Defendant] steered the city council's review of [Plaintiff's] proposals with unfounded pessimism, injurious statements and concealment of the detailed analytics provided for the council's review and necessary for an informed and good faith "final decision" as promised.

23. Most damaging, in an April 17, 2018 email correspondence directed to City Council Members [Defendant], **maliciously, with corrupt intent and acting outside and beyond the scope of his official duties**, stated in pertinent part[,] "[]My assessment of the situation is that [Plaintiff] does not have the money or financial backing to build the sports complex on the land he owns adjacent to Holly Oak Park especially given he has a contingency contract to sell the best part of it to an apartment complex. I believe he somehow sees Holly Oak Park as a way to develop that sports complex using public resources. I have serious doubts he will put any significant amount of money toward any improvements.

24. On July 17, 2018 a public records request was sent to the City of Shelby requesting any documents or information relied upon in [Defendant's] April 17, 2018 "assessments". This public records request was responded to by Shelby City Clerk . . . stating, "To my knowledge no such documents exist."

> 25. Additionally, on October 23, 2018 the Mayor fielded a meeting with several concerned and disgruntled leaders of Cleveland County including Plaintiff . . . during which the bad faith negotiations of the City of Shelby became a point of discussion.
>
> 26. During this discussion the Mayor stated to Plaintiff . . . and the others in attendance that he and Defendant . . . "made it clear to Plaintiff that the City would not be able to help fund any part of the project". The Mayor was then presented with an E-mail from Defendant . . . to Plaintiff that completely contradicted the Mayor's representation and left him surprised and unable to explain the contradiction.
>
> 27. This most recent interaction further displays the bad faith nature of the discussions and negotiations conducted by the City of Shelby and led by Defendant . . . .
>
> 28. Despite [Plaintiff's] undeniable qualifications, adequate resources and display of business flexibility and ingenuity [Plaintiff] was denied an open and fair consideration of his business proposals due in large part to the damaging comments made by Defendant . . . .
>
> . . . .
>
> 30. On April 17, 2018 Defendant Ricky Howell, **maliciously. with corrupt intent and acting outside and beyond the scope of his official duties**, communicated via electronic mail several statements that were false.

In lieu of filing an answer, Defendant moved to dismiss the complaint pursuant to North Carolina Rules of Civil Procedure 12(b)(1), (2), and (6). Attached to Defendant's motion was the City of Shelby Resolution No. 56-2008 referenced in the complaint; an email Defendant sent on 17 April 2018 to the City Council also referenced in the complaint and upon which the libel claim was based; and an affidavit provided by Defendant, authenticating both. The email sent by Defendant reads as follows:

> Good afternoon. I need direction from Council as to how you want to approach [Plaintiff's] request to appear before Council to present his proposal. I offer the following suggestion.

> I believe it would be unfruitful for Council to invite him to appear and then engage in a painstaking back and forth over details. But if Council wishes to merely listen to his proposal which was previously emailed to you all then I certainly see no harm in that.
>
> [Plaintiff's] latest letter provided to you last night takes a great deal out of context from discussions the Mayor and I had with him early on. He never specifically indicated that it was his desire to essentially take over Holly Oak Park. If he had I know the Mayor and I both would have told him that was a non starter. My assessment of the situation is that [Plaintiff] does not have the money or financial backing to build the sports complex on the land he owns adjacent to Holly Oak Park especially given he has a contingency contract to sell the best part of it for an apartment complex. I believe he somehow sees Holly Oak Park as a way to develop that sports complex using public resources. I have serious doubts he will put any significant amount of money toward any improvements.
>
> A public/private partnership has to be a two way street where there is some direct public benefit derived. In this situation I only see a private benefit. Direction from Council is needed. I would remind you all that discussing this amongst yourselves in groups less than 4 is fine as long as the open meetings law is considered. Otherwise this will need to be discussed at your next regular Council meeting.
>
> I would like to hear your individual thoughts if you wish to call me.

After a hearing, the trial court entered an order on 13 January 2020 denying Defendant's motion to dismiss. Defendant timely filed notice of appeal.

II. Appellate Jurisdiction

[1] We first determine whether Defendant's appeal is properly before us. Where, as here, the trial court's order does not dispose of all claims, it is an interlocutory order. N.C. Gen. Stat. § 1A-1, Rule 54(a) (2019). There is generally no right of immediate appeal of an interlocutory order. *Goldston v. Am. Motors Corp.*, 326 N.C. 723, 725, 392 S.E.2d 735, 736 (1990). Immediate appeal may be taken, however, if the order affects a

substantial right or constitutes an adverse ruling as to personal jurisdiction, N.C. Gen. Stat. § 1-277, or if the trial court certified the order for immediate appeal under N.C. Gen. Stat. § 1A-1, Rule 54(b). The record in this case does not indicate that the trial court certified the order pursuant to Rule 54(b).

Defendant moved to dismiss the complaint under Rules 12(b)(1), 12(b)(2), and 12(b)(6) based on his assertion that he is entitled to "absolute immunity" and "public official's immunity." Public official immunity is "a derivative form of sovereign immunity." *Epps v. Duke Univ., Inc.*, 122 N.C. App. 198, 203, 468 S.E.2d 846, 850 (1996). The trial court denied the motion without specifically stating the ground or grounds upon which it ruled.

We dismiss Defendant's appeal from the trial court's order denying his Rule 12(b)(1) motion based on the defense of public official immunity. Orders denying Rule 12(b)(1) motions to dismiss based on sovereign immunity, and therefore public official immunity, "are not immediately appealable because they neither affect a substantial right nor constitute an adverse ruling as to personal jurisdiction." *Can Am South, LLC v. State*, 234 N.C. App. 119, 124, 759 S.E.2d 304, 308 (2014) (citing *Meherrin Indian Tribe v. Lewis*, 197 N.C. App. 380, 384, 677 S.E.2d 203, 207 (2009)).

We allow Defendant's appeal from the trial court's order denying his Rule 12(b)(2) and 12(b)(6) motions to dismiss based on public official immunity. "As has been held consistently by this Court, denial of a Rule 12(b)(2) motion premised on sovereign immunity constitutes an adverse ruling on personal jurisdiction and is therefore immediately appealable under section 1-277(b)." *Id.* (citations omitted). Moreover, we are bound by the longstanding rule that the denial of a 12(b)(6) motion based on the defense of sovereign immunity affects a substantial right and is immediately appealable under section 1-277(a). *See Green v. Kearney*, 203 N.C. App. 260, 266, 690 S.E.2d 755, 761 (2010).

III. Standard of Review

"[U]pon a defendant's motion to dismiss for lack of personal jurisdiction [under Rule 12(b)(2)], the plaintiff bears the burden of making out a *prima facie* case that jurisdiction exists." *Bauer v. Douglas Aquatics, Inc.*, 207 N.C. App. 65, 68, 698 S.E.2d 757, 761 (2010) (citation omitted). "[W]hen a defendant supplements [his] motion with affidavits or other supporting evidence, the unverified allegations of a plaintiff's complaint can no longer be taken as true or controlling[.]" *Id.* (internal quotation marks and citation omitted) (emphasis omitted). If the plaintiff offers

no evidence in response, this Court considers (1) any allegations in the complaint that are not controverted by the defendant's evidence and (2) all facts in the defendant's evidence, which are uncontroverted because of the plaintiff's failure to offer evidence in response. *Banc of Am. Sec. LLC v. Evergreen Int'l Aviation, Inc.*, 169 N.C. App. 690, 693-94, 611 S.E.2d 179, 183 (2005) (citation omitted).

> Where . . . the record contains no indication that the parties requested that the trial court make specific findings of fact, and the order appealed from contains no findings, we presume that the trial court made factual findings sufficient to support its ruling, and it is this Court's task to review the record to determine whether it contains evidence that would support the trial court's legal conclusions, and to review the trial court's legal conclusions de novo.

McCullers v. Lewis, 265 N.C. App. 216, 220-21, 828 S.E.2d 524, 531 (2019) (citations omitted).

In this case, Defendant's motion to dismiss, supplemented with supporting evidence and an affidavit, did not controvert Plaintiff's allegations. Plaintiff rested on the unverified allegations in his complaint. As a result, this Court considers the allegations in Plaintiff's complaint and all facts in Defendant's evidence (together, "the Pleadings"). Additionally, because the trial court's three findings of fact do not relate to the scope of Defendant's duties or whether he acted with malice or corruption, we presume the trial court made factual findings sufficient to support its ruling. It is this Court's task to review the Pleadings to determine whether they contain evidence that would support the trial court's legal conclusions, and to review the trial court's legal conclusions de novo. *Id.*

IV. Analysis

[2] Public official immunity precludes a suit against a public official in his individual capacity and protects him from liability as long as the public official "lawfully exercises the judgment and discretion with which he is invested by virtue of his office, keeps within the scope of his official authority, and acts without malice or corruption[.]" *Smith v. State*, 289 N.C. 303, 331, 222 S.E.2d 412, 430 (1976) (citation omitted).

> It is well settled that absent evidence to the contrary, it will always be presumed that public officials will discharge their duties in good faith and exercise their powers in accord with the spirit and purpose of the law. This presumption places a heavy burden on the party challenging

> the validity of public officials' actions to overcome this presumption by competent and substantial evidence.

Strickland v. Hedrick, 194 N.C. App. 1, 10, 669 S.E.2d 61, 68 (2008) (internal quotation marks and citations omitted). To rebut the presumption and hold a public official liable in his individual capacity, a plaintiff's complaint must allege, and the facts alleged must support a conclusion, "that [the official's] act, or failure to act, was corrupt or malicious, or 'that [the official] acted outside of and beyond the scope of his duties.' " *Doe v. Wake Cty.*, 264 N.C. App. 692, 695-96, 826 S.E.2d 815, 819 (2019) (citation omitted).

A. Scope of Duties

A city manager's duties are statutorily defined in N.C. Gen. Stat. § 160A-148, which states in pertinent part that:

> (2.) He shall direct and supervise the administration of all departments, offices, and agencies of the city, subject to the general direction and control of the council, except as otherwise provided by law. (3) He shall attend all meetings of the council and recommend any measures that he deems expedient. . . . (7) He shall make any other reports that the council may require concerning the operations of city departments, offices, and agencies subject to his direction and control.

N.C. Gen. Stat. § 160A-148 (2019).

Plaintiff states in his brief that he "is not objecting to the fact that [Defendant] was in fact acting in his capacity as City Manager of the City of Shelby at the time the tortious behaviors plead [sic] in Appellees [sic] complaint took place[,]" and the Pleadings show that Defendant acted within the scope of his statutory authority and duties. Defendant met with Plaintiff on behalf of Shelby to discuss Defendant's proposals for a sports complex and communicated with the mayor and the City Council regarding the proposals. Defendant sought guidance from the City Council and provided his own recommendation regarding the proposals. Defendant, in his capacity as the city manager, communicated by email to the City Council explicitly seeking its guidance on Plaintiff's most recent proposal to the City Council. The Pleadings demonstrate that Defendant "lawfully exercise[d] the judgment and discretion with which he is invested by virtue of his office[.]" *Smith*, 289 N.C. at 331, 222 S.E.2d at 430.

B. Malice or Corruption

Because the Pleadings show that Plaintiff acted within the scope of his statutory authority and duties, to rebut the presumption of his good faith and exercise of powers in accord with the spirit and purpose of the law, Plaintiff must have sufficiently alleged, and the facts must support a conclusion, that Defendant's acts were malicious or corrupt.

"A defendant acts with malice when he wantonly does that which a man of reasonable intelligence would know to be contrary to his duty and which he intends to be prejudicial or injurious to another." *Mitchell v. Pruden*, 251 N.C. App. 554, 559, 796 S.E.2d 77, 82 (2017) (citation omitted). An act is corrupt when it is done with "a wrongful design to acquire some pecuniary profit or other advantage." *State v. Hair*, 114 N.C. App. 464, 468, 442 S.E.2d 163, 165 (1994) (citation omitted). A conclusory allegation that a public official acted maliciously or corruptly is not sufficient, by itself, to withstand a motion to dismiss. *Doe*, 264 N.C. App. at 695-96, 826 S.E.2d at 819. "The facts alleged in the complaint must support such a conclusion." *Meyer v. Walls*, 347 N.C. 97, 114, 489 S.E.2d 880, 890 (1997). *See Mitchell*, 251 N.C. App. at 555-56, 560-61, 796 S.E.2d at 79-80, 82-83 (plaintiffs' bare, conclusory allegation that defendant's actions were "only meant to further his personal campaign to maliciously defame [plaintiffs]" was insufficient to support a legal conclusion that defendant acted with malice).

Plaintiff's complaint alleges, in pertinent part, as follows:

> 22. Through the retention of communications from [Defendant] to City Council it is clear that [Plaintiff] was given promises of a thorough and open vetting process while [Defendant] steered the city council's review of [Plaintiff's] proposals with unfounded pessimism, injurious statements and concealment of the detailed analytics provided for the council's review and necessary for an informed and good faith "final decision" as promised.
>
> 23. Most damaging, in an April 17, 2018 email correspondence directed to City Council Members [Defendant], **maliciously, with corrupt intent and acting outside and beyond the scope of his official duties**, stated in pertinent part[,] "[]My assessment of the situation is that [Plaintiff] does not have the money or financial backing to build the sports complex on the land he owns adjacent to Holly Oak Park especially given he has a contingency contract to sell the best part of it to an apartment complex.

> I believe he somehow sees Holly Oak Park as a way to develop that sports complex using public resources. I have serious doubts he will put any significant amount of money toward any improvements.
>
> 24. On July 17, 2018 a public records request was sent to the City of Shelby requesting any documents or information relied upon in [Defendant's] April 17, 2018 "assessments". This public records request was responded to by Shelby City Clerk . . . stating, "To my knowledge no such documents exist."
>
> 25. Additionally, on October 23, 2018 the Mayor fielded a meeting with several concerned and disgruntled leaders of Cleveland County including Plaintiff . . . during which the bad faith negotiations of the City of Shelby became a point of discussion.
>
> 26. During this discussion the Mayor stated to Plaintiff . . . and the others in attendance that he and Defendant . . . "made it clear to Plaintiff that the City would not be able to help fund any part of the project". The Mayor was then presented with an E-mail from Defendant . . . to Plaintiff that completely contradicted the Mayor's representation and left him surprised and unable to explain the contradiction.
>
> 27. This most recent interaction further displays the bad faith nature of the discussions and negotiations conducted by the City of Shelby and led by Defendant . . . .

We note that although the complaint alleges that Defendant acted maliciously, with corrupt intent, "we are not required to treat this allegation of a legal conclusion as true." *Dalenko v. Wake Cnty. Dep't of Human Servs.*, 157 N.C. App. 49, 56, 578 S.E.2d 599, 604 (2003).

Although Plaintiff alleges Defendant acted in bad faith by his "unfounded pessimism, injurious statements and concealment of the detailed analytics provided for the council's review," Plaintiff alleges no false statements of fact made by Defendant. The fact that Defendant discussed the project with Plaintiff and considered various proposals from him over a two-year period prior to expressing certain concerns to the City Council does not tend to support a conclusion that Defendant acted maliciously or corruptly by recommending measures for expediency and reporting his concerns to the City Council. Moreover, the fact

that Defendant sent an email to the City Council expressing his concerns about Plaintiff's financial ability to complete the project, even though the Shelby City Clerk did not know of any documents or information relied upon by Defendant in making his assessment, does not support a conclusion that Defendant acted maliciously or corruptly. In fact, Defendant's office vests him with the authority and responsibility to exercise judgment and discretion, as discussed above.

The plain text of Defendant's email indicates that Defendant was seeking the City Council's direction and sharing with the City Council his assessment of the situation based on his own judgment. Defendant began with an explicit request for direction on how best to respond to Plaintiff's most recent proposal. Defendant explicitly offered the opinion that "no harm" could come from discussing the proposal with Plaintiff. After reporting discrepancies between his understanding of the negotiations and Plaintiff's newest proposal, Defendant again explicitly requested "[d]irection from Council." Defendant recommended that the City Council be mindful of the applicable open meeting laws and reiterated his desire to receive input from the City Council. These details of Defendant's email contradict Plaintiff's assertions that Defendant intentionally engaged in a process that lacked transparency. Rather, Defendant's email illustrates his intent to adhere to the City Council's wishes, comply with applicable laws regarding transparency of communications regarding City Council business, and fulfill his statutory obligations.

Plaintiff's complaint has not sufficiently alleged facts that would support a conclusion that Defendant acted in a manner that was "contrary to his duty and which he intend[ed] to be prejudicial or injurious to another[,]" *Mitchell*, 251 N.C. App. at 559, 796 S.E.2d at 82, or acted with "a wrongful design to acquire some pecuniary profit or other advantage," *Hair*, 114 N.C. App. at 468, 442 S.E.2d at 165. Because we presume that Defendant discharged his duties in good faith and exercised his power in accordance with the spirit and purpose of the law, and Plaintiff has not alleged facts to the contrary, the complaint failed to support a legal conclusion that Defendant acted with malice or corruption.

V. Conclusion

Plaintiff has failed to allege facts necessary to support a conclusion that Defendant acted outside the scope of his duties or acted in a matter that was malicious or corrupt. Thus, Plaintiff has failed to allege sufficient facts to overcome the heavy burden of rebutting the presumption that Defendant discharged his duties as a public official in good faith, *see Strickland*, 194 N.C. App. at 10, 669 S.E.2d at 68, and public official

immunity bars Plaintiff's action against Defendant. Accordingly, Plaintiff has failed to make out a *prima facie* case that jurisdiction exists, and the trial court erred by denying Defendant's Rule 12(b)(2) motion to dismiss. Because the trial court erred by denying Defendant's Rule 12(b)(2) motion to dismiss, we need not address whether the trial court erred by denying Defendant's Rule 12(b)(6) motion to dismiss.

We reverse the trial court's order.

REVERSED.

Judges INMAN and BERGER concur.

KAVITHA N. KRISHNAN OTD, PETITIONER
v.
NORTH CAROLINA DEPARTMENT OF HEALTH AND HUMAN SERVICES, RESPONDENT

No. COA20-107

Filed 3 November 2020

Administrative Law—state employee grievance proceeding—deadline to commence contested case—more specific statute controls

An administrative law judge erred by dismissing a state employee's contested case as untimely under N.C.G.S. § 150B-23(f), which states that the time to file a contested case begins when "notice is given," which occurs once an agency places its final decision in the mail. Although section 150B-23(f) is a general statute that applies to all contested case proceedings, the more specific statute in the North Carolina Human Resources Act—N.C.G.S. § 126-34.02(a), which governs employee grievance and disciplinary actions—governed this case, and petitioner complied with the statute by filing the case within thirty days "of receipt" of the final agency decision.

Appeal by petitioner from order entered 12 December 2019 by Administrative Law Judge J. Randolph Ward in the Office of Administrative Hearings. Heard in the Court of Appeals 25 August 2020.

Dysart Willis Houchin & Hubbard, by Meredith Woods Hubbard, for petitioner-appellant.

Attorney General Joshua H. Stein, by Assistant Attorney General William Walton, for respondent-appellee.

DIETZ, Judge.

In this state employee grievance proceeding, the administrative law judge, on the judge's own initiative without notice to the parties, dismissed the case on the ground that it was not timely initiated. The ALJ reasoned that, under the general timing rules for contested cases in N.C. Gen. Stat. § 150B-23(f), the time to commence the case began to run when the agency placed its final decision in the mail.

Both parties argue on appeal that the ALJ's ruling is erroneous. We agree. This contested case is governed by a more specific provision in the North Carolina Human Resources Act, N.C. Gen. Stat. § 126-34.02, which states that the time to commence a contested case runs from the employee's "receipt of" the final agency decision. Applying the ordinary meaning of the word "receipt," the time to commence this contested case began to run when the decision was delivered, not when the agency placed it in the mail. We therefore reverse the ALJ's order and remand this case for further proceedings.

Facts and Procedural History

Kavitha Krishnan worked at a development center operated by the North Carolina Department of Health and Human Services. In 2019, Krishnan's employer placed her on leave while it pursued an investigation for "unacceptable personal conduct and/or unsatisfactory job performance resulting from an allegation of violation of informed consent regulations." Krishnan resigned while this investigation was ongoing. The day after she resigned, Krishnan submitted a *pro se* employment complaint alleging unlawful retaliation and workplace harassment.

On 17 May 2019, Krishnan received a letter from DHHS sent by certified United States mail. The letter stated that Krishnan's grievance had been dismissed and the matter administratively closed. The letter also provided information about further review through a contested case proceeding.

On 17 June 2019, Krishnan filed a petition for a contested case hearing. The administrative law judge assigned to the case later entered an order dismissing the case on the ground that the petition commencing the proceeding was untimely. The ALJ raised this issue on the judge's own initiative without providing the parties with an opportunity to

address the timeliness of the petition. Krishnan appealed the ALJ's order to this Court.

Analysis

Krishnan argues that the ALJ erroneously dismissed this contested case on the ground that the petition was not timely filed. The Department of Health and Human Services concedes that the ALJ erred. We agree.

In the order of dismissal, the ALJ determined that "[i]n the course of considering the merits of the parties' arguments . . . it has become apparent that the Petitioner failed to timely file her Petition for a contested case hearing in this matter." The ALJ noted that "Petitioner was given notice of the Respondent's final agency decision and of her right to appeal to the Office of Administrative Hearings by certified letter dated May 14, 2019" which was "placed in an official depository of the United States Postal Service" the following day. The ALJ also noted that Krishnan's petition "was filed on June 17, 2019." The ALJ then determined that, because the petition "must be filed within 30 days of receipt of the final agency decision" under the applicable statute, the petition was untimely.

That determination is erroneous. It appears that the ALJ relied on a provision in N.C. Gen. Stat. § 150B-23 stating that the time to file a petition for a contested case "shall commence when notice is given . . . by the placing of the notice in an official depository of the United States Postal Service wrapped in a wrapper addressed to the person at the latest address given by the person to the agency." N.C. Gen. Stat. § 150B-23(f). Relying on this provision, the ALJ appears to have concluded that notice was given when the agency placed the decision in the mail on 15 May 2019 and thus the 30-day deadline to file began to run at that time.

The flaw in this reasoning is that N.C. Gen. Stat. § 150B-23(f) is a general statute that establishes default rules for contested case proceedings under the Administrative Procedure Act. This case is subject to those general statutes, but also to a more specific statute in the North Carolina Human Resources Act stating that a "contested case must be filed within 30 days of receipt of the final agency decision." N.C. Gen. Stat. § 126-34.02(a).

The words "notice" and "receipt" in these statutes mean different things. "When examining the plain language of a statute, undefined words in a statute must be given their common and ordinary meaning." *State v. Rieger*, 267 N.C. App. 647, 649, 833 S.E.2d 699, 701 (2019). Here, however, the word "notice" has a special statutory definition. In

ordinary usage, one would not have notice of something unless one actually knows about it. But under Section 150B-23(f), a petitioner is *deemed* to have notice of a final agency decision as soon as the agency places the decision in the mail, even if it takes several days for the petitioner to receive it. N.C. Gen. Stat. § 150B-23(f).

By contrast, the word "receipt" in Section 126-34.02 is undefined and thus is given its ordinary meaning. The word "receipt" means the "act of receiving something given or handed to one; the fact of being received." *Receipt*, *Oxford English Dictionary* (2nd ed. 1989). So, in ordinary English usage, one is not in "receipt" of a letter when it is mailed; receipt occurs when the letter is delivered.

As a result of the differing meanings of the words "notice" and "receipt," there is a conflict between the time deadlines created by these two statutes. The more general statute, N.C. Gen. Stat. § 150B-23(f), which applies to all contested case proceedings, starts the time to commence a contested case on 15 May 2019, when the agency placed its final decision in the mail. But the more specific statute, N.C. Gen. Stat. § 126-34.02(a), which governs the time deadlines in cases involving employee grievance and disciplinary actions, starts the time on 17 May 2019, when that decision was delivered by certified mail.

"Where one of two statutes might apply to the same situation, the statute which deals more directly and specifically with the situation controls over the statute of more general applicability." *Trustees of Rowan Tech. Coll. v. J. Hyatt Hammond Assocs., Inc.*, 313 N.C. 230, 238, 328 S.E.2d 274, 279 (1985). Applying that principle here, the statute dealing directly and specifically with employee grievances controls over the broader statute addressing all forms of administrative proceedings. We therefore agree with the parties that the time deadline in this case did not begin to run when DHHS placed its final agency decision in the mail. Instead, it began to run upon Krishnan's "receipt of" the decision—that is, when that certified mailing was delivered to Krishnan. Accordingly, Krishnan's petition was timely and the ALJ erred by dismissing the contested case on the ground that the petition was untimely.

Conclusion

We reverse the administrative law judge's order and remand for further proceedings.

REVERSED AND REMANDED.

Judges STROUD and ZACHARY concur.

MITCHELL v. BOSWELL

[274 N.C. App. 174 (2020)]

MASON MITCHELL D/B/A MASON MITCHELL MOTORSPORTS, AND MASON MITCHELL MOTORSPORTS, INC., PLAINTIFFS
v.
SCOTT BOSWELL, DEFENDANT

No. COA19-1077

Filed 3 November 2020

Statute of Frauds—mediated settlement agreement—parties' signatures required—"parties" defined

Where the parties to a lawsuit participated remotely in a mediated settlement conference in which their attorneys signed a settlement agreement on their behalf, and where plaintiff eventually signed the agreement but defendant refused to do so, an order granting plaintiff's motion to enforce the agreement was reversed because the agreement failed to satisfy the applicable statute of frauds (N.C.G.S. § 7A-38.1(*l*)), which requires a mediated settlement agreement to be "signed by the parties against whom enforcement is sought." The language of section 7A-38.1(*l*) was unambiguous, and the plain meaning of the word "parties" did not include the parties' attorneys or other agents.

Appeal by Plaintiffs from Order entered 9 September 2019 by Judge Jesse B. Caldwell, III in Iredell County Superior Court. Heard in the Court of Appeals 14 April 2020.

Hartsell & Williams, P.A., by Andrew T. Cornelius, Austin "Dutch" Entwistle, III, and E. Garrison White, for plaintiffs-appellees.

Stam Law Firm, PLLC, by R. Daniel Gibson, for defendant-appellant.

MURPHY, Judge.

Motions to enforce settlement agreements are treated like motions for summary judgment and should be granted only when there are no genuine issues of material fact and the movant is entitled to relief as a matter of law. The statute of frauds may preclude such relief as a matter of law. Where a statute's terms are unambiguous, we consider their plain meaning. Here, the applicable statute of frauds by its plain terms requires the parties, not their attorneys, to sign a mediated settlement agreement. The failure of the parties to sign the mediated settlement

agreement renders it unenforceable as a matter of law. The motion to enforce the mediated settlement agreement should have been denied. We reverse.

BACKGROUND

Defendant, Scott Boswell ("Boswell"), and Plaintiffs, Mason Mitchell ("Mitchell") and Mason Mitchell Motorsports, Inc., were ordered by the Superior Court to participate in a mediated settlement conference, which took place on 29 April 2019. At the mediated settlement conference, the parties created a memorandum that seemingly described the terms under which the parties would settle the case ("memorandum of settlement"). Both parties were out of state at the time of the mediation, so the mediation was conducted with the attorneys and mediator present while the parties were available by telephone. The parties did not sign the memorandum of settlement themselves; however, the attorneys purportedly signed on the parties' behalf. The memorandum of settlement is shown in relevant part below:

[THIS SPACE INTENTIONALLY LEFT BLANK]

STATE OF NORTH CAROLINA

IREDELL COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
17CVS1631

MASON MITCHELL d/b/a MASON MITCHELL MOTORSPORTS & MASON MITCHELL MOTORSPORTS, Inc.)
Plaintiff
vs.
SCOTT BOSWELL
Defendant.

Memorandum

Both parties mutually and voluntarily to dismiss all claims with prejudice under the above mentioned case number pursuant the following terms:

1. For Scott Boswell to pay the full amount of $45,000.00 in certified funds to Hartsell & Williams Trust account within 30 days of execution of the settlement agreement which will be drafted by attorneys Andrew Cornelius and Marisa Thompson within 30 days of this dated memorandum.

2. For MMM to allow for Scott Boswell and/or agent to pick up his race car and two race seats within 45 days of the execution of the settlement agreement.

This is only a memorandum and a settlement agreement with more details will be drafted.

This 29 day of April, 2019

Retired Judge Preston Cornelius

Andrew Cornelius o/b/o MMM

Marisa Thompson o/b/o Scott Boswell

Following the creation of the memorandum of settlement, Boswell's attorney drafted a proposed settlement agreement pursuant to the terms of the memorandum of settlement and sent it to Mitchell's attorney. This document was eventually signed by Mitchell; however, Boswell did not sign the settlement agreement. In a letter via email, Mitchell demanded Boswell execute the settlement agreement as Mitchell contended the parties had agreed to do in the memorandum of settlement. When this did not occur, Mitchell filed a motion to enforce the memorandum of settlement.

After the filing of this motion, competing affidavits from the mediator and Boswell were filed. The affidavit from the mediator stated in relevant part:

> Both parties were present via telephone conference because both parties reside out of state. . . . [T]he mediation resulted in a settlement that resolved all issues memorialized by a memorandum of settlement signed by myself, [and the parties' attorneys on behalf of their clients]. . . . That I was present when [Boswell] authorized [his counsel] to sign the memorandum of judgment on his behalf due to his lack of physical presence.

Boswell's affidavit stated in relevant part:

> I did not review any settlement documentation requiring my signature or my attorney's signature as part of the 29 April 2019 mediation. . . . I did not sign or authorize anyone to sign on my behalf any settlement documentation as part of the 29 April 2019 mediation. . . . I was not aware of any settlement documentation signed as part of the 29 April 2019 mediation until 4 June 2019. On 4 June 2019, I reviewed a letter from [Mitchell's] counsel to [my attorney] dated 3 June 2019 which attached a document that [my attorney] purportedly signed on my behalf. . . . [My attorney at the time] did not and does not have my authorization to sign the document attached to the 3 June 2019 letter.

At the hearing on this motion, Boswell contended the motion to enforce the memorandum of settlement should be denied, in part due to the failure to satisfy the statute of frauds.[1] The trial court granted Mitchell's motion to enforce the memorandum of settlement and found the "Memorandum of Settlement is a binding contract between the parties which contains the material terms of that agreement, and that counsel for the parties had the authority at mediation to execute the

1. Although no transcript was filed in the Record, during oral argument Mitchell conceded this argument was presented below. *See State v. Williams*, 247 N.C. App. 239, 244 n.3, 784 S.E.2d 232, 235 n.3 (2016) (citing *State v. Stroud*, 147 N.C. App. 549, 564, 557 S.E.2d 544, 553 (2001)). Thus, this argument is preserved for our review. N.C. R. App. P. 10(a)(1) ("In order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context.").

Memorandum of Settlement on behalf of the parties." Boswell timely appeals the trial court's order enforcing the memorandum of settlement.

ANALYSIS

A motion to enforce a memorandum of settlement is treated as a motion for summary judgment. *Hardin v. KCS Int'l, Inc.*, 199 N.C. App. 687, 695, 682 S.E.2d 726, 733 (2009). "The standard of review for summary judgment is de novo." *Forbis v. Neal*, 361 N.C. 519, 524, 649 S.E.2d 382, 385 (2007).

> On appeal of a trial court's allowance of a motion for summary judgment, we consider whether, on the basis of materials supplied to the trial court, there was a genuine issue of material fact and whether the moving party is entitled to judgment as a matter of law. Evidence presented by the parties is viewed in the light most favorable to the non-movant.

Summey v. Barker, 357 N.C. 492, 496, 586 S.E.2d 247, 249 (2003) (quoting *Dobson v. Harris*, 352 N.C. 77, 83, 530 S.E.2d 829, 835 (2000)). Our General Assembly determines which contracts must be in writing and by whom they must be signed in order to be enforceable.

Whether Mitchell was entitled to enforcement of the memorandum of settlement as a matter of law turns on whether Boswell's failure to sign the memorandum of settlement made it unenforceable against him under the statute of frauds.[2] The controlling statute of frauds for settlement agreements resulting from mediated settlement conferences is N.C.G.S. § 7A-38.1(l). N.C.G.S. § 7A-38.1(l) provides:

> No settlement agreement to resolve any or all issues reached at the proceeding conducted under this subsection or during its recesses shall be enforceable unless it has been reduced to writing and signed by the parties against whom enforcement is sought.

N.C.G.S. § 7A-38.1(l) (2019). The order that required the parties to complete a mediated settlement conference was based on N.C.G.S. § 7A-38.1, as it explicitly cited this statute. *See* N.C.G.S. § 7A-38.1(a) (2019) ("this

2. Boswell argues genuine issues of material fact existed due to conflicting affidavits and ambiguous language regarding the parties' intent in the memorandum of settlement, and argues the memorandum of settlement is an agreement to agree, not a settlement agreement, that is unenforceable as a matter of law. We do not address these arguments and express no opinion as to them because the statute of frauds issue is determinative of this appeal. *See Rogerson v. Fitzpatrick*, 170 N.C. App. 387, 392, 612 S.E.2d 390, 393 (2005).

section is enacted to require parties to [S]uperior [C]ourt civil actions and their representatives to attend a pretrial, mediated settlement conference conducted pursuant to this section and pursuant to rules of the Supreme Court adopted to implement this section"). Thus, N.C.G.S. § 7A-38.1(l) is controlling here. Furthermore, the memorandum of settlement is such a settlement agreement subject to N.C.G.S. § 7A-38.1(l). By its terms, the memorandum of settlement is an agreement[3] "to dismiss all claims with prejudice," resolving the case, which the trial court enforced against Boswell.

Mitchell contends N.C.G.S. § 7A-38.1(l) should be read to "allow[] for authorized persons to enter into settlement agreements on behalf of a non-attending party at [a mediated settlement conference]." Mitchell relies on Mediated Settlement Conference Rule 4(A)(2)(a), which at the time permitted a party to participate without physical attendance, in conjunction with the lack of "a procedure for how a non-attending party . . . is to sign the agreement which has been reduced to writing in the event that a settlement is reached." *See* Revised Rules Implementing Statewide Mediated Settlement Conferences and Other Settlement Procedures in Superior Court Civil Actions, 367 N.C. 1020 (2014).

We disagree. As Mitchell acknowledges, the meaning of N.C.G.S. § 7A-38.1(l) is an issue of statutory interpretation. In addressing these questions, our Supreme Court has stated:

> Questions of statutory interpretation are ultimately questions of law for the courts and are reviewed de novo. The principal goal of statutory construction is to accomplish the legislative intent. The best indicia of that intent are the language of the statute, the spirit of the act and what the act seeks to accomplish. The process of construing a statutory provision must begin with an examination of the relevant statutory language. It is well settled that where the language of a statute is clear and unambiguous, there is no room for judicial construction and the courts must construe the statute using its plain meaning. In other words, if the statutory language is clear and unambiguous, the court eschews statutory construction in favor of giving the words their plain and definite meaning.

---

3. We note that we are assuming, without deciding, the memorandum of settlement is an agreement. As alluded to, Boswell contends it was not an agreement; however, it makes no difference to the outcome here. If the memorandum of settlement was not an agreement, then it was not enforceable against Boswell. If the memorandum of settlement was an agreement, then the statute of frauds prevents it from being enforceable against Boswell.

Wilkie v. City of Boiling Spring Lakes, 370 N.C. 540, 547, 809 S.E.2d 853, 858 (2018) (internal quotations marks, alterations, and citations omitted). "An unambiguous word has a 'definite and well known sense in the law.' " *Fid. Bank v. N.C. Dep't of Revenue*, 370 N.C. 10, 19, 803 S.E.2d 142, 148-149 (2017) (quoting *C.T.H. Corp. v. Maxwell*, 212 N.C. 803, 810, 195 S.E. 36, 40 (1938)). "[L]anguage in a statute is unambiguous when it 'express[es] a single, definite and sensible meaning[.]' " *Id.* at 19, 803 S.E.2d at 149 (quoting *State Highway Comm'n v. Hemphill*, 269 N.C. 535, 539, 153 S.E.2d 22, 26 (1967)). "In the absence of a contextual definition, courts may look to dictionaries to determine the ordinary meaning of words within a statute." *Dickson v. Rucho*, 366 N.C. 332, 342, 737 S.E.2d 362, 370 (2013) (quoting *Perkins v. Ark. Trucking Servs., Inc.*, 351 N.C. 634, 638, 528 S.E.2d 902, 904 (2000)).

Here, the language at issue is "signed by *the parties* against whom enforcement is sought." N.C.G.S. § 7A-38.1(l) (emphasis added). There is no definition of "party" within the statute. Black's Law Dictionary defines a "party" as:

> 1. Someone who takes part in a transaction <a party to the contract>. . . .
>
> 2. One by or against whom a lawsuit is brought; anyone who both is directly interested in a lawsuit and has a right to control the proceedings, make a defense, or appeal from an adverse judgment; LITIGANT <a party to the lawsuit>. • For purposes of res judicata, a party to a lawsuit is a person who has been named as a party and has a right to control the lawsuit either personally, or, if not fully competent, through someone appointed to protect the person's interests. In law, all nonparties are known as "strangers" to the lawsuit.

Party, Black's Law Dictionary (11th ed. 2019). In the full definition, there is no reference to "party" including an attorney. Thus, according to its "definite and well known sense in the law," "party" does not include an attorney. *Fid. Bank*, 370 N.C. at 19, 803 S.E.2d at 148-149. "Furthermore, this Court cannot 'delete words used or insert words not used' in a statute." *State ex rel. Util. Comm'n v. N.C. Sustainable Energy Ass'n*, 254 N.C. App. 761, 764, 803 S.E.2d 430, 433 (2017) (quoting *Lunsford v. Mills*, 367 N.C. 618, 623, 766 S.E.2d 297, 301 (2014)). If we were to read "the parties" in N.C.G.S. § 7A-38.1(l) to include the parties' attorneys, then we would be inserting language into the statute in contravention of this principle.

The language in N.C.G.S. § 7A-38.1(l) requires the people "who take[] part in a transaction," or the "[o]ne by or against whom a lawsuit is brought" to sign any settlement agreement reached as the result of a mediated settlement conference in order for it to be enforced against them under N.C.G.S. § 7A-38.1. *See Party*, Black's Law Dictionary (11th ed. 2019). Here, Boswell was the party against whom enforcement was sought, not his attorney. The failure of Boswell to sign the memorandum of settlement renders it unenforceable against him as a matter of law.[4] N.C.G.S. § 7A-38.1(l) (2019). As a result, the trial court erred in granting the motion to enforce the memorandum of settlement.[5]

Even assuming, *arguendo*, N.C.G.S. § 7A-38.1(l) was ambiguous, requiring statutory interpretation, we would still come to the same result—that N.C.G.S. § 7A-38.1(l) does not permit authorized agents to sign on behalf of a party. In adopting the language of N.C.G.S. § 7A-38.1(l), the General Assembly unambiguously omitted the authority to sign by authorized agent as it has included in other statute of frauds contexts. *See* N.C.G.S. § 22-1 (2019) ("signed by the party charged therewith or some other person thereunto by him lawfully authorized"); N.C.G.S. § 22-2 (2019) ("signed by the party to be charged therewith, or by some other person by him thereto lawfully authorized"); N.C.G.S. § 25-2-201(1) (2019) ("signed by the party against whom enforcement is sought or by his authorized agent or broker"). "[I]t is always presumed that the [General Assembly] acted with full knowledge of prior and existing law." *See Dickson*, 366 N.C. at 341, 737 S.E.2d at 369, (quoting *Ridge Cmty. Investors, Inc. v. Berry*, 293 N.C. 688, 695, 239 S.E.2d 566, 570 (1977)). We presume the General Assembly was fully aware of the inclusion of authorized agents in other statutes of frauds, and the absence of authorized agents in this statute therefore reflects the General Assembly's decision to specifically require the parties' signatures to satisfy N.C.G.S. § 7A-38.1(l). This interpretation is also supported by the separate treatment of parties and attorneys in other subsections of N.C.G.S. § 7A-38.1. *See* N.C.G.S. §§ 7A-38.1(b)(1) (2019) ("the parties to a civil action and their representatives"); 7A-38.1(f) ("The parties to a

---

4. We recognize the increased use of virtual and telephonic attendance at settlement conferences. Without deciding the issue today, we observe the current availability of the provisions of the Uniform Electronic Transactions Act. N.C.G.S. § 66-311 *et seq*.

5. We have held "[t]he statute of frauds was designed to guard against fraudulent claims supported by perjured testimony; it was not meant to be used by defendants to evade an obligation based on a contract fairly and admittedly made." *House v. Stokes*, 66 N.C. App. 636, 641, 311 S.E.2d 671, 675 (1984). Such a holding does not apply here, where Boswell has not admitted entering into the memorandum of settlement below or on appeal, and instead contends he did not enter into the contract.

[S]uperior [C]ourt civil action in which a mediated settlement conference is ordered, their attorneys and other persons or entities with authority"). The references to non-parties with authority to sign and bind a party, both within N.C.G.S. § 7A-38.1 and outside of it, demonstrate the intentional decision on the part of the General Assembly to require the signature of the *parties* themselves to satisfy the statute of frauds. *Id.* at 342, 737 S.E.2d at 370 ("This definition suggests that the General Assembly's use of the word "provision" was meant to refer only to other statutory clauses and not to common law doctrines such as the attorney-client privilege and work-product doctrine. . . . This interpretation is bolstered by the fact that the General Assembly repeatedly has demonstrated that it knows how to be explicit when it intends to repeal or amend the common law.").

CONCLUSION

The trial court erroneously granted Mitchell's motion to enforce the memorandum of settlement when the memorandum of settlement did not satisfy the statute of frauds promulgated by our General Assembly in N.C.G.S. § 7A-38.1(l). Mitchell was not entitled to enforcement of the settlement agreement as a matter of law and we reverse the trial court's order to the contrary.

REVERSED.

Chief Judge McGEE and Judge BROOK concur.

N.C. DEP'T OF STATE TREASURER v. RIDDICK

[274 N.C. App. 183 (2020)]

NORTH CAROLINA DEPARTMENT OF STATE TREASURER, RETIREMENT SYSTEMS DIVISION, DALE FOLWELL, State Treasurer (in official capacity only), STEVEN C. TOOLE, Director of Retirement Systems Division (in official capacity only), NORTH CAROLINA RETIRMENT SYSTEM COMMISSION BOARD OF TRUSTEES (in official capacity only), Petitioners

v.

LAURA M. RIDDICK, Respondent

LAURA M. RIDDICK, Petitioner

v.

NORTH CAROLINA DEPARTMENT OF STATE TREASURER, RETIREMENT SYSTEMS DIVISION, DALE FOLWELL, State Treasurer (in official capacity only), STEVEN C. TOOLE, Director of Retirement Systems Division (in official capacity only), NORTH CAROLINA RETIRMENT SYSTEM COMMISSION BOARD OF TRUSTEES (in official capacity only), Respondents

No. COA20-224

Filed 3 November 2020

1. Public Officers and Employees—Local Governmental Employees' Retirement System—forfeiture—conviction of felony—N.C.G.S. § 128-38.4A

Where a county register of deeds was convicted of embezzling more than $600,000 of public funds in a separate criminal proceeding, the trial court properly concluded that the forfeiture provisions of N.C.G.S. § 128-38.4A—which mandates that any member of the Local Governmental Employees' Retirement System (LGERS) who commits a felony that is directly related to the member's office while in service must forfeit retirement benefits in LGERS—applied to her. Her argument that the forfeiture provisions did not apply because the sentencing judge in the separate criminal proceeding did not find an aggravating factor under N.C.G.S. § 15A-1340.16(d)(9) was contrary to the plain language of the statute.

2. Public Officers and Employees—Local Governmental Employees' Retirement System—forfeiture—conviction of felony—N.C.G.S. § 128-38.4A—N.C.G.S. § 161-50.4(c)

Where a county register of deeds forfeited certain of her retirement benefits pursuant to N.C.G.S. § 128-38.4A because of her embezzlement convictions, her argument that the forfeiture was invalid under N.C.G.S. § 161-50.4(c)—which enumerates specific felonies to justify a forfeiture—was rejected because that provision did not invalidate or repeal N.C.G.S. § 128-38.4A.

3. Public Officers and Employees—Local Governmental Employees' Retirement System—forfeiture—conviction of felony—N.C.G.S. § 128-38.4A—not unconstitutional impairment of contract

Where a county register of deeds forfeited certain of her retirement benefits pursuant to N.C.G.S. § 128-38.4A because of her convictions for embezzlement, her argument that denial of those benefits constituted an unconstitutional impairment of contract in violation of the state and federal constitutions was rejected. She failed to maintain her obligation under the contract for retirement benefits when she embezzled public funds, and the forfeiture of her benefits was reasonable and necessary to hold her responsible for her crimes.

4. Public Officers and Employees—Local Governmental Employees' Retirement System—forfeiture—conviction of felony—N.C.G.S. § 128-38.4A—not unconstitutional retroactive taking

Where a county register of deeds forfeited certain of her retirement benefits pursuant to N.C.G.S. § 128-38.4A because of her convictions for embezzlement, the forfeiture did not constitute an unconstitutional retroactive taking of her contractual rights in her retirement benefits without just compensation. The forfeiture statute was properly applied as of its effective date, rather than the dates of the register's first and second offenses of embezzlement (which were before the statute's effective date).

5. Public Officers and Employees—Local Governmental Employees' Retirement System—forfeiture—conviction of felony—N.C.G.S. § 128-38.4A—not cruel and unusual punishment

Where a county register of deeds forfeited certain of her retirement benefits pursuant to N.C.G.S. § 128-38.4A because of her convictions for embezzlement, the register failed to show that the forfeiture constituted cruel and unusual punishment. The punishment was authorized by statute, and the register cited no cases in support of her argument.

6. Public Officers and Employees—Local Governmental Employees' Retirement System—forfeiture—conviction of felony—N.C.G.S. § 128-38.4A—unused sick leave

Where a county register of deeds forfeited certain of her retirement benefits pursuant to N.C.G.S. § 128-38.4A because of her convictions for embezzlement, all of the register's creditable service

that she converted from unused sick leave upon her retirement was subject to forfeiture, and the trial court erred by concluding that she forfeited only the unused sick leave accrued after the effective date of the forfeiture statute.

7. Public Officers and Employees—Local Governmental Employees' Retirement System—forfeiture—conviction of felony—N.C.G.S. § 128-38.4A—vested service for unelected position

Where a county register of deeds forfeited certain of her retirement benefits pursuant to N.C.G.S. § 128-38.4A because of her convictions for embezzlement, the Court of Appeals rejected the argument that the register should forfeit all accrued service that she transferred from the Teachers' and State Employees' Retirement System (TSERS) to the Local Governmental Employees' Retirement System (LGERS). The register's vested service accrued in TSERS was for an unelected position prior to her criminal acts, which was not subject to forfeiture, pursuant to N.C.G.S. § 128.26(w).

8. Public Officers and Employees—Local Governmental Employees' Retirement System—forfeiture—conviction of felony—N.C.G.S. § 128-38.4A—Registers of Deeds' Supplemental Pension Fund

Where a county register of deeds forfeited certain of her retirement benefits pursuant to N.C.G.S. § 128-38.4A because of her convictions for embezzlement, the register remained eligible to retire from the Registers of Deeds' Supplemental Pension Fund (RDSPF) because she still had the minimum of twenty years of creditable service required for retirement from the Local Governmental Employees' Retirement System (LGERS), allowing her to retire from RDSPF (with her requisite years of service as a register of deeds).

Appeal by North Carolina Department of State Treasurer, Retirement Systems Division, Dale Folwell, State Treasurer; Thomas G. Causey, Director of the Retirement Systems Division; and the North Carolina Retirement System Commission Board of Trustees (collectively, "the Retirement System parties") and Laura M. Riddick ("Riddick") from order entered 27 September 2019 by Judge C. Winston Gilchrist in Wake County Superior Court. Heard in the Court of Appeals 6 October 2020.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Katherine A. Murphy, for the Retirement System parties.

Robert F. Orr and Gammon, Howard & Zeszotarski, PLLC, by Joseph E. Zeszotarski, Jr., for Laura M. Riddick.

TYSON, Judge.

I. Background

Riddick was employed by the North Carolina Department of Natural and Cultural Resources from 1990 until 1996. Riddick was elected the Register of Deeds of Wake County and served from 1 December 1996 until she resigned on 31 March 2017. Riddick filed for retirement benefits on 1 April 2017.

Riddick embezzled public funds in an amount exceeding $600,000 while serving as Register of Deeds beginning in 2010 through 2016. Riddick entered guilty pleas to six (6) counts of felonious Embezzlement by a Public Official in Excess of $100,000, in violation of N.C. Gen. Stat. § 14-92 (2019). Riddick was sentenced to an active term in prison of 60 to 84 months. Riddick was also ordered to pay restitution in the amount of $926,615, which was paid in full after sentencing. These underlying criminal convictions and ordered restitution are not before us on this appeal.

The Retirement Systems Division oversees the relevant retirement systems: Teachers' and State Employees' Retirement System ("TSERS"), the Local Governmental Employees' Retirement System ("LGERS"), and the Registers of Deeds' Supplemental Pension Fund ("RDSPF").

A. TSERS

TSERS is a defined benefit pension plan. State employee members make contributions to the plan by deduction of six percent (6%) of their paycheck over the course of their careers. The State also makes a contribution. In order to retire with benefits of TSERS, the member must be either: (1) at least sixty years old with five years of vested membership, or (2) have completed thirty years of creditable service. *See* N.C. Gen. Stat. § 135-5(a) (2019).

A TSERS member's full retirement benefit is calculated as 0.0182, multiplied by a member's average compensation over the highest average salary for four consecutive years, multiplied by the number of years of creditable service. N.C. Gen. Stat. § 135-5(b19)(2) (2019). A reduced benefit is calculated by taking the above formula then multiplying a reduction factor from N.C. Gen. Stat. § 135-5(b19)(2) b, c (2019).

B. LGERS

Similar to the requirements above, local governmental employees, who are employed by entities that participate in LGERS, become members of LGERS. As with TSERS, employees have six percent (6%) withheld from their pay during each pay period. Under LGERS, an employee is eligible to retire upon: (1) being at least sixty years old with five vested years of creditable service; or, (2) have completed thirty years of creditable service. N.C. Gen. Stat. § 128-27(a1) (2019). An employee in LGERS is also eligible for early retirement at a reduced benefit, if they are at least fifty years old and accrued at least twenty years of creditable service. *Id.*

Full retirement benefits are calculated as .0185, multiplied by the employee's average compensation over four consecutive years which create the highest average, multiplied by the number of years of creditable service. *See* N.C. Gen. Stat. § 128-27(b21)(2)a. If an eligible employee takes an early retirement, a reduced benefit is calculated under the same formula as above. *See id.*

C. RDSPF

Any register of deeds, who retires from LGERS or an equivalent locally sponsored plan with at least ten years of eligible service as a register of deeds, is entitled to receive a monthly pension from RDSPF. N.C. Gen. Stat. § 161-50.5 provides the pension amount is to be calculated by one share for each full year of eligible service multiplied by the total number of years of eligible service. N.C. Gen. Stat. § 161-50.5 (2019). Each share is calculated by determining the total number of years of eligible service for all eligible retired registers of deeds on December 21 of each calendar year. *Id.* Payment cannot exceed the maximum retirement allowance. *Id.*

D. Riddick's Retirement

N.C. Gen. Stat. § 128-34(b) allows an employee to transfer benefits accrued in TSERS into an LGERS account. This transfers the accumulated contributing interest and service credits to LGERS and terminates the employee's eligibility and participation in TSERS.

In February 2017, Riddick completed a form to transfer accrued membership service from her TSERS account into her LGERS account. By completing this transfer, Riddick acknowledged she would "lose all pending and accrued rights to any benefits" from her prior membership in TSERS. When Riddick filed for retirement benefits on 1 April 2017, she was over fifty years old and had accrued at least twenty years of

creditable employment service in LGERS. Her age and years accrued qualified her for a reduced retirement benefit from LGERS. Riddick was also eligible for payments from RDSPF, because she also had accrued at least ten years of service as a register of deeds.

When Riddick retired, her 618 days of unused sick leave were converted to 2.5833 years of additional credited service. *See* N.C. Gen. § 128-26(E) (2019). As of 1 April 2017, Riddick had 20.3333 years of creditable service in LGERS, 6.1667 years transferred from TSERS, and the 2.5833 years of credited sick leave to total 29.0833 years of creditable employment service in LGERS.

N.C. Gen. Stat. § 128-38.4A(a) mandates a member of LGERS, who is convicted of a felony, must forfeit retirement benefits from LGERS, if the offense is committed while the "member is in service" and the felonious act is "directly related to the member's office or employment." N.C. Gen. Stat. § 128-38.4A(a) (2019).

The Retirement System parties determined both statutory conditions in N.C. Gen. Stat. § 128-38.4A(a) were met and reduced Riddick's creditable service to 16 years. The Retirement System parties concluded Riddick forfeited 4.333 years of membership in LGERS earned between 1 December 2012 and her resignation on 31 March 2017, all 2.5833 years of converted credited sick leave accrued at retirement, and 6.667 years of vested service transferred from TSERS to LGERS.

With only 16 years remaining after forfeiture, Riddick was ineligible to retire from LGERS prior to age 60 at a reduced benefit. Under the statute, Riddick lacked the minimum age to receive benefits or twenty years of accrued creditable service necessary for early retirement. Because Riddick was ineligible for immediate retirement from LGERS, she was also ineligible to receive immediate benefits from RDSPF.

The Retirement System parties ceased benefit payments on 25 September 2018 and assessed Riddick $126,290.28 due for overpayment of retirement funds from her retirement on 1 April 2017 until 25 September 2018. The return of Riddick's contributions, after deducting for taxes, resulted in a refund of $47,724.77, which was credited against the assessed overpayment, reducing the amount Riddick owed to $78,565.51.

Riddick filed a petition for a contested case hearing. The temporary ALJ concluded Riddick forfeited only 4.333 years of membership service in LGERS and 1.25 years of accrued service for unused sick leave, as of 1 December 2012, reducing her creditable service from 29.0833

years to 23.5 years. As Riddick retained over twenty years of creditable service, the ALJ ordered the Retirement System parties to recalculate Riddick's early retirement. The ALJ further concluded Riddick was entitled to payments from RDSPF from the date of her retirement until the date of the Division's final agency decision on 25 September 2018.

Both parties petitioned for judicial review of the ALJ's decision. The trial court applied the proper standard of review and affirmed the decision of the ALJ. Both parties timely appealed.

II. Jurisdiction

This Court possesses jurisdiction pursuant to N.C. Gen. Stat. §§ 7A-27(b) and 150B-52 (2019).

III. Issues

Riddick argues the trial court erred by: (1) concluding the forfeiture provisions of N.C. Gen. Stat. § 128-38.4A applies to her without the sentencing judge in the underlying felonies finding the aggravating factor under N.C. Gen. Stat. § 15A-1340.16(d)(9); (2) concluding she had forfeited her rights to receive RDSPF benefits after notification by the Retirement System parties on 25 September 2018; (3) violated her rights under the Constitution of the United States and the North Carolina Constitution by applying the forfeiture statute retroactively, and by taking her property without just compensation; (4) violated her rights under the Constitution of the United States and the North Carolina Constitution by instituting a cruel and unusual punishment; and, (5) reducing her converted sick leave to accrued service after 1 December 2012.

The Retirement System parties argue the trial court erred by: (1) crediting instead of forfeiting any accruals after 1 December 2012; (2) not forfeiting all of Riddick's unused sick leave converted to credited service in her LGERS account; and, (3) concluding Riddick was entitled to benefits from the RDSPF.

IV. Standards of Review

"It is well settled that in cases appealed from administrative tribunals, questions of law receive *de novo* review, whereas fact-intensive issues such as sufficiency of the evidence to support an agency's decision are reviewed under the whole record test." *Harris v. N.C. Dep't of Pub. Safety*, 252 N.C. App. 94, 99, 798 S.E.2d 127, 132 (2017) (citation and quotation marks omitted).

"Where the petitioner alleges that the agency decision was based on error of law, the reviewing court must examine the record *de novo*, as though the issue had not yet been considered by the agency." *Blackburn v. N.C. Dep't of Pub. Safety*, 246 N.C. App. 196, 207, 784 S.E.2d 509, 518 (2016) (citation and quotation marks omitted). "Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the [ALJ]." *Id.* (alteration in original) (citation and quotation marks omitted).

"Under the whole record test, the reviewing court must examine all competent evidence to determine if there is substantial evidence to support the administrative agency's findings and conclusions." *Henderson v. N.C. Dep't of Human Resources*, 91 N.C. App. 527, 530, 372 S.E.2d 887, 889 (1988) (citation omitted). "When the trial court applies the whole record test, however, it may not substitute its judgment for the agency's as between two conflicting views, even though it could reasonably have reached a different result had it reviewed the matter *de novo*." *N.C. Dep't of Env't & Natural Res. v. Carroll*, 358 N.C. 649, 660, 599 S.E.2d 888, 895 (2004) (citation and quotation marks omitted).

"[T]he whole record test is not a tool of judicial intrusion; instead, it provides a reviewing court the capability to determine whether an administrative decision has a rational basis in the evidence." *Brewington v. N.C. Dep't of Pub. Safety*, 254 N.C. App. 1, 19, 802 S.E.2d 115, 128 (2017).

Like the jury in a jury trial, the ALJ is the sole judge of the credibility of the witnesses and the weight to be given to the evidence as the finder of fact. *Id.* at 20, 802 S.E.2d at 129. The challenger carries the burden to show prejudicial and reversible error on appeal.

V. N.C. Gen. Stat. § 15A-1340.16(d)(9)

[1] Riddick argues the trial court erred by concluding the forfeiture provisions of N.C. Gen. Stat. § 128-38.4A (2019) applies to her without the sentencing judge in the underlying felonies finding the aggravating factor under N.C. Gen. Stat. § 15A-1340.16(d)(9) (2019).

N.C. Gen. Stat. § 128-38.4A provides:

> (a) Except as provided in G.S. 128-26(x), the Board of Trustees *shall not pay* any retirement benefits or allowances, except for a return of member contributions plus interest, *to any member who is convicted of any felony* under federal law or the laws of this State *if all* of the following apply:

> (1) The offense is committed while the member is in service.
>
> (2) The conduct resulting in the member's conviction is directly related to the member's office or employment.
>
> (b) Subdivision (2) or subsection (a) of this statute *shall apply to felony convictions where the court finds under G.S. 15A-1340.16(d)(9)*.

N.C. Gen. Stat. § 128-38.4A (emphasis supplied). N.C. Gen. Stat. § 15A-1340.16(d)(9) provides as an aggravating factor for crimes: "The defendant held public elected or appointed office or public employment at the time of the offense and the offense directly related to the conduct of the office or employment." N.C. Gen. Stat. § 15A-1340.16(d)(9).

N.C. Gen. Stat. § 128-26(x) provides:

> If a member who is in service and has not vested in this System on December 1, 2012, is convicted of an offense listed in G.S. 128-38.4A for acts committed after December 1, 2012, then that member shall forfeit all benefits under this System, except for a return of member contributions plus interest. If *a member who is in service and has vested* in this System on December 1, 2012, is convicted of an offense listed in G.S. 128-38.4A for *acts committed after* December 1, 2012.

N.C. Gen. Stat. § 128-26(x) (2019) (emphasis supplied).

A. Rules of Statutory Construction

When reviewing the parties' arguments, we apply the plain meanings of N.C. Gen. Stat. § 128-38.4A. We are guided by several well-established principles of statutory construction.

"The principal goal of statutory construction is to accomplish the legislative intent." *Lenox Inc. v. Tolson*, 353 N.C. 659, 664, 548 S.E.2d 513, 517 (2001) (citations omitted). "When construing legislative provisions, this Court looks first to the plain meaning of the words of the statute itself[.]" *State v. Ward*, 364 N.C. 157, 160, 694 S.E.2d 729, 731 (2010).

"Statutes *in pari materia* must be read in context with each other." *Cedar Creek Enters. v. Dep't of Motor Vehicles*, 290 N.C. 450, 454, 226 S.E.2d 336, 338 (1976). "Interpretations that would create a conflict between two or more statutes are to be avoided, and statutes should be

reconciled with each other whenever possible." *Taylor v. Robinson*, 131 N.C. App. 337, 338, 508 S.E.2d 289, 291 (1998) (internal quotation marks, citations, and ellipses omitted).

"[W]here a literal interpretation of the language of a statute will lead to absurd results, or contravene the manifest purpose of the Legislature, as otherwise expressed, the reason and purpose of the law shall control." *State v. Beck*, 359 N.C. 611, 614, 614 S.E.2d 274, 277 (2005) (quoting *Mazda Motors of Am., Inc. v. Sw. Motors, Inc.*, 296 N.C. 357, 361, 250 S.E.2d 250, 253 (1979)).

B. Analysis

Riddick pleaded guilty to six (6) counts of felonious embezzlement by public employee of over $100,000 each, all of which occurred while she was employed and served as the elected Wake County Register of Deeds. By pleading guilty, Riddick admitted committing six violations of N.C. Gen. Stat. § 14-92 ("If any . . . register of deeds . . . shall embezzle or wrongfully convert to his own use, or corruptly use, or shall misapply for any purpose other than that for which the same are held, or shall fail to pay over and deliver to the proper persons entitled to receive the same when lawfully required so to do, any moneys, funds, securities or other property which such officer shall have received by virtue or color of his office in trust for any person or corporation, such officer shall be guilty of a felony.").

N.C. Gen. Stat. § 128-38.4A(a) mandates "the Board of Trustees *shall not pay*" if "[t]he offense is committed while the member is in service" and "the conduct resulting in the member's *conviction is directly related to the member's office*." (emphasis supplied). This statute is not ambiguous. Riddick argues N.C. Gen. Stat. § 128-38.4A(a)(2) does not apply when the N.C. Gen. Stat. § 15A-1340.16(d)(9) aggravating factor was not found. Her assertion is contrary to the plain language of the statute.

N.C. Gen. Stat. § 128-38.4A(b) applies when the aggravating factor is found "*or* other applicable state or Federal procedure that the member's conduct is directly related to the member's office or employment." N.C. Gen. Stat. § 128-38.4A(b) (emphasis supplied). The General Assembly has since repealed subsection (b). *See* 2020 N.C. Sess. Laws 48, § 4.3(b).

Riddick pleaded guilty to six violations of N.C. Gen. Stat. § 14-92. The plain language of that statute provides if a: "register of deeds . . . shall embezzle . . . [she] shall be guilty of a felony." By pleading guilty to six violations of N.C. Gen. Stat. § 14-92, Riddick expressly admitted she had embezzled public funds entrusted to her by virtue of her office and while serving as the Wake County Register of Deeds.

The statute provides a disjunctive "or" and enables it to be invoked through "state or Federal procedure", which is provided for by the express elements of N.C. Gen. Stat. § 14-92. There are scenarios where an aggravating factor is not found by the jury or a judge or is omitted in a plea bargain. *See* N.C. Gen. Stat. § 15A-1340.16(a1) (2019). Riddick's argument is overruled. As the ALJ found and the trial court properly concluded, a valid forfeiture of future accruals occurred as of 1 December 2012, we need not address Riddick's forfeiture arguments under N.C. Gen. Stat. § 128-38.4A.

VI. Denial of RDSPF Benefits

[2] Riddick argues the forfeiture was invalid under N.C. Gen. Stat. § 161-50.4 (c) (2019). As held above, a valid forfeiture as of 1 December 2012 occurred under N.C. Gen. Stat. § 128-38.4A. The General Assembly outlined specific mechanisms for forfeiture. By enacting N.C. Gen. Stat. § 161-50.4 (c), which enumerated specific felonies to justify a forfeiture, the General Assembly did not invalidate or repeal the mechanism under N.C. Gen. Stat. § 128-38.4A for forfeiture. This argument is dismissed.

VII. Impairment of Contract

[3] Riddick further argues the denial of benefits constitutes an unconstitutional impairment of contract in violation of the Constitution of the United States and the North Carolina Constitution.

An appellate court "presumes that statutes passed by the General Assembly are constitutional, and duly passed acts will not be struck unless found unconstitutional beyond a reasonable doubt." *N.C. Ass'n of Educators v. State*, 368 N.C. 777, 786, 786 S.E.2d 255, 262 (2016).

The Contract Clause in the Constitution of the United States provides, inter alia: "No State shall . . . pass any . . . Law impairing the Obligation of Contracts[.]" U. S. Const. art I, § 10. In *U.S. Trust Co. of N.Y. v. New Jersey*, 431 U.S. 1, 52 L. Ed. 2d 92 (1977), the Supreme Court of the United States articulated a three-part test to determine whether a state has impaired a contractual obligation.

North Carolina adopted the three-part test from *U.S. Trust Co.* in *Bailey v. State*, 348 N.C. 130, 500 S.E.2d 54 (1998). Our Supreme Court held "[t]he *U.S. Trust Co.* test requires a court to ascertain (1) whether a contractual obligation is present, (2) whether the state's actions impaired that contract, and (3) whether the impairment was reasonable and necessary to serve an important public purpose." *Id.* at 141, 500 S.E.2d at 60.

The Supreme Court of the United States and the Supreme Court of North Carolina have both "recognized a presumption that a state statute is not intended to create private contractual or vested rights but merely declares a policy to be pursued until the legislature shall ordain otherwise." *N.C. Ass'n of Educators*, 368 N.C. at 786, 786 S.E.2d at 262 (citing *Dodge v. Bd. of Educ.*, 302 U.S. 74, 79, 82 L. Ed. 57, 62 (1937)). Our Supreme Court held: "Construing a statute to create contractual rights in the absence of an expression of unequivocal intent would be at best ill-advised, binding the hands of future sessions of the legislature and obstructing or preventing subsequent revisions and repeals." *Id.* at 786, 786 S.E.2d at 262-63. *See Lake v. State Health Plan for Teachers & State Emps.*, 264 N.C. App. 174, 181, 825 S.E.2d 645, 651 (2019). The party asserting the creation of a contract bears the burden of overcoming this presumption against the formation of a contract. *Id.*

The Retirement System parties assert the RDSPF is governed by N.C. Gen. Stat. § 161-50.1(c) (2019). This statute provides "The provisions of this Article shall be subject to future legislative change or revision, and *no person is deemed to have acquired any vested right to a pension payment provided by this Article.*" N.C. Gen. Stat. § 161-50.1(c) (emphasis supplied).

Riddick argues she has a vested contractual right to RDSPF benefits and payments, citing *Bailey*. In *Bailey*, our Supreme Court examined a constitutional challenge to a statute that removed the tax-exempt status of retirement benefits for state employees, holding the RDSPF was one of "at least thirteen different public employee retirement systems . . . operating for the purpose of providing public servants with retirement benefits." *Bailey*, 348 N.C at 136, 500 S.E.2d at 57.

Our Supreme Court further held:

> Each of these systems contains certain preconditions to the receipt of benefits. The primary one is the requirement that employees work a predetermined amount of time in public service before they are eligible for retirement benefits. After employment for the set number of years, an employee is deemed to have "vested" in the retirement system. Thereafter, the employee generally is guaranteed a percentage payment at retirement based upon years of service.

Id. at 138, 500 S.E.2d at 58.

"[T]he relationship between the Retirement Systems and state employees who have vested in those systems is contractual in nature."

Id. at 140, 500 S.E.2d at 60. The Supreme Court of North Carolina in *Bailey* struck down the statute and held there was an unconstitutional impairment of contract to those employees who had vested when it was passed by the legislature. *Id.* at 153, 500 S.E.2d at 67. Riddick asserts *Bailey* determines a contractual relationship exists and N.C. Gen. Stat. § 128-38.4A interferes with this contractual right for her.

N.C. Gen. Stat. § 128-38.4A serves an important governmental purpose in holding elected officials responsible and accountable for their illegal actions. This forfeiture provides additional deterrence beyond that offered by the criminal statutes. This remedy is "reasonable and necessary to serve an important government purpose." *Bailey*, 348 N.C. at 141, 500 S.E.2d at 60 (citation omitted). A government or public employee being paid a taxpayer-funded salary must not benefit from their position to embezzle public taxpayer funds. In exchange for these benefits, the elected official also maintains obligations under the contract for retirement benefits. *See McCraw v. Llewellyn*, 256 N.C. 213, 216, 123 S.E.2d 575, 578 (1962) ("One of the essential elements of every contract is mutuality of agreement" (citation omitted)).

To remain eligible for retirement benefits, Riddick mutually agreed and bore a duty to faithfully execute the duties of her office and to receive, hold, and account for all public funds entrusted to her, which she admittedly violated by pleading guilty to six (6) counts of embezzlement of over $100,000 each. N.C. Gen. Stat. § 128-38.4A does not unconstitutionally impair contracts under the Federal or State Constitutions. Riddick's argument is overruled.

VIII. Retroactive Taking

[4] Riddick argues the forfeiture violates her rights under Article I, Section 10 of the Constitution of the United States and Article I, Section 19 of the North Carolina Constitution by retroactively taking her property without just compensation.

The relationship between the State and Riddick is contractual in nature. "The privilege of contracting is both a liberty and a property right . . . . 'Included in the right of personal liberty and the right of private property — partaking of the nature of each — is the right to make contracts for the acquisition of property.' " *Morris v. Holshouser*, 220 N.C. 293, 295-96, 17 S.E.2d 115, 117 (1941) (citations omitted).

Our Supreme Court stated: "The application of a statute is deemed 'retroactive' or 'retrospective' when its operative effect is to alter the legal consequences of conduct or transactions completed prior to its enactment." *Gardner v. Gardner*, 300 N.C. 715, 718, 268 S.E.2d 468, 471 (1980).

In *Gardner*, our Supreme Court examined whether "a statute may be applied retroactively to alter the effect of a final judgment which had previously established the proper venue for an action" and held the legislation altered the status of a prior ruling. *Id.* at 716, 268 S.E.2d at 469. "Upon principle, every statute, which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability in respect to transactions or considerations already passed, must be deemed retrospective[.]" *Id.* at 718, 268 S.E.2d at 471 (citation omitted).

In *Bailey*, our Supreme Court found the change in taxation status was a "derogation of plaintiffs' rights established through the retirement benefits contracts and thus constitutes a taking of their private property." *Bailey*, 348 N.C. at 155, 500 S.E.2d at 69.

Riddick acquired contractual rights in LGERS when she vested in 2001. N.C. Gen. Stat. § 128-38.4A is effective as of 1 December 2012. The Retirement System parties expressly cannot forfeit accredited and accrued service time prior to the enactment of the act, which would run afoul of our General Statutes, *Bailey*, and *Gardner*. The Retirement System parties and the trial court correctly concluded Riddick forfeited accrued time after 1 December 2012 when the statute became effective.

This forfeiture differs from the retroactive application of both *Bailey* and *Gardner*. In *Bailey*, retirees lost benefits they had earned for future payments. *Bailey*, 348 N.C. at 155, 500 S.E.2d at 69. In *Gardner*, a prior legal ruling was overturned due to the statutory change. *Gardner*, 300 N.C. at 717, 268 S.E.2d at 470.

Riddick stopped accruing time the date the statute became effective, not on the dates of her first and second offenses of embezzlement. Both of these crimes occurred prior to the effective date of the statute. She did not lose her accrued vested right to receive future payments prior to that date. Riddick was placed in the same position as if she had retired on the effective date of the statute. She received the benefit of accruing service time, even while admittedly embezzling funds, until the effective date of the statute ceased that accrual effective 1 December 2012. The statute only addresses prospective acts. Riddick's argument is overruled.

IX. Cruel and Unusual Punishment

[5] Riddick argues her loss of accrued service constitutes cruel and unusual punishment in violation of the North Carolina Constitution. N.C. Const. art. I, § 27. "When the punishment imposed is within the limit fixed by law it cannot be excessive." *State v. Blake*, 157 N.C. 608,

611, 72 S.E. 1080, 1082 (1911). The forfeiture is authorized by statute and subject to the 1 December 2012 effective date.

Beyond citing the state constitutional provision and a definition from a treatise, Riddick does not cite any case, nor can this Court find any case, holding as cruel and unusual punishment a statute forbidding further and prospective accrual of state retirement benefits, upon an employee's related criminal conduct while holding public office or employment. Plaintiff has failed to show the forfeiture of pension benefits under the statutory mechanism provided by the General Assembly is cruel and unusual punishment.

Riddick has not argued the forfeiture provisions violates the excessive fines clauses of the Constitution of the United States and the North Carolina Constitution. By failing to assert any authority to support her arguments, Riddick has waived any argument this statute violates the excessive fines clauses in either constitution. *See* N.C. R. App. P. 28(b)(6) ("Issues not presented in a party's brief, of in support of which no reason or argument is stated, will be taken as abandoned."). Riddick's argument is dismissed.

X. Forfeiture of Unused Sick Leave after 1 December 2012

[6] Riddick argues her creditable service attributed to unused sick leave should not have been forfeited under N.C. Gen. Stat. § 128-38.4A. As established above, the forfeiture under N.C. Gen. Stat. § 128-38.4A as of its effective date was lawful. All sick leave she purportedly accrued after 1 December 2012 was subject to forfeiture due to her admitted criminal acts. Riddick's argument is overruled.

The Retirement System parties argue Riddick forfeited all her unused sick leave because an employee had no vested right to convert sick leave to accrued service until the actual date of retirement. N.C. Gen. Stat. § 128-26(x) provides:

> If a member who is in service and has not vested in this System on December 1, 2012, is convicted of an offense listed in G.S. 128-38.4A for acts committed after December 1, 2012, then that member shall forfeit all benefits under this System, except for a return of member contributions plus interest. *If a member who is in service and has vested in this System on December 1, 2012, is convicted of an offense listed in G.S. 128-38.4A for acts committed after December 1, 2012, then that member is not entitled to any creditable service that accrued after December 1, 2012.*

N.C. Gen. Stat. § 128-26(x) (emphasis supplied).

N.C. Gen. Stat. § 128-26(e) provides:

> Creditable service at retirement on which the retirement allowance of a member shall be based shall consist of the membership service rendered by the member since he or she last became a member, and also if the member has a prior service certificate which is in full force and effect, the amount of the service certified on the prior service certificate; and if the member has sick leave standing to the member's credit upon retirement on or after July 1, 1971, one month of credit for each 20 days or portion thereof, but not less than one hour; *sick leave shall not be counted in computing creditable service for the purpose of determining eligibility for disability retirement or for a vested deferred allowance.* Creditable service for unused sick leave shall be allowed only for sick leave accrued monthly during employment under a duly adopted sick leave policy and for which the member may be able to take credits and be paid for sick leave without restriction. However, in no instance shall unused sick leave *be credited to a member's account at retirement* if the member's last day of actual service is more than 365 days prior to the effective date of the member's retirement. *Days of sick leave standing to a member's credit at retirement* shall be determined by dividing the member's total hours of sick leave at retirement by the hours per month such leave was awarded under the employer's duly adopted sick leave policy as the policy applied to the member when the leave was accrued.

N.C. Gen. Stat. 128-26(e) (2019) (emphasis supplied).

The plain language of N.C. Gen. Stat. § 128-26(x) states the "member is not entitled to any creditable service that accrued after December 1, 2012." N.C. Gen. Stat. § 128-26(x). The unused sick leave is only allowed to be converted to creditable service time into the member's account at retirement. N.C. Gen. Stat. § 128-26(e). Riddick was only able to convert her unused sick leave into creditable service time upon her retirement effective 1 April 2017. Her retirement occurred after the effective forfeiture date of 1 December 2012 in N.C. Gen. Stat. § 128-38.4A.

Riddick forfeited all 2.5833 years of creditable service converted from unused sick leave, not just the 1.25 years of creditable service forfeited after 1 December 2012 as concluded by the ALJ and affirmed by the superior court. The superior court's ruling on this issue is reversed

and this cause is remanded to that court for further remand with instructions to recalculate Riddick's accrued service without including any credit for unused sick leave consistent with the statute and this opinion.

XI. 2017 Transfer of Membership from TSERS to LGERS

[7] The Retirement System parties assert Riddick should forfeit all accrued service transferred from TSERS to LGERS. They argue the transfer of creditable service accrued in the retirement system after the effective date of N.C. Gen. Stat. § 128-38.4A, 1 December 2012, and is subject to forfeiture.

By transferring her accrued and vested benefits from TSERS to LGERS Riddick attested: "I understand that upon completion of the transfer, I lose all pending and accrued rights to any benefits from my membership in the Retirement System from which I am transferring accumulated contributions and service credits."

N.C. Gen. Stat. § 128-26(w) provides:

> If a member who is an elected government official and has not vested in this System on July 1, 2007, is convicted of an offense listed in G.S. 128-38.4 for acts committed after July 1, 2007, then that member shall forfeit all benefits under this System, except for a return of member contributions plus interest. If a member who is an elected government official and has vested in this System on July 1, 2007, is convicted of an offense listed in G.S. 128-38.4 for acts committed after July 1, 2007, then that member is not entitled to any creditable service that accrued after July 1, 2007. *No member shall forfeit any benefit or creditable service earned from a position not as an elected government official.*

N.C. Gen. Stat. § 128-26(w) (2019).

Riddick worked for the North Carolina Department of Natural and Cultural Resources from 1990 until 1996, six and one-half years in an unelected position. This employment and length of service vested and earned her creditable time in TSERS, which she was allowed to transfer to LGERS. N.C. Gen. Stat. § 128-26(w) is controlling, Riddick cannot forfeit vested service she had already accrued as an unelected state official prior to her criminal acts. By the express language of the transfer, Riddick lost her right to further participate in TSERS, but not her prior accrued and vested service while in an unelected position. The

Retirement System parties' argument on forfeiture of her vested service in TSERS is overruled.

XII. Retirement from RDSPF

[8] The Retirement System parties argue Riddick was ineligible to retire from RDSPF because of lack of and the improper calculation of service time. Because we affirm the judgment of the superior court to credit her vested service in TSERS to LGERS, Riddick was eligible to retire from RDSPF as of 1 December 2012. The ALJ and superior court properly concluded Riddick forfeited 4.3333 years of LGERS creditable service, but remained eligible to retire from LGERS. Because of her eligibility to retire from LGERS, she was also eligible to retire from RDSPF. The Retirement System parties argument is overruled.

XIII. Conclusion

We affirm the superior court's conclusions: (1) the forfeiture provisions of N.C. Gen. Stat. § 128-38.4A applies to Riddick; (2) Riddick did not forfeit her rights to receive benefits from RDSPF prior to 1 December 2012 after notification by the Retirement System parties; (3) N.C. Gen. Stat. § 128-38.4A does not violate her rights under the Constitution of the United States and the North Carolina Constitution by retroactively applying the forfeiture statute and taking her property without just compensation; (4) the application of the forfeiture statute post 1 December 2012 is not cruel and unusual punishment; and, (5) disallowing retirement credit for her unused sick leave post 1 December 2012. These parts of the superior court's order remain undisturbed and are affirmed.

The superior court erred by concluding Riddick forfeited only 1.25 years of creditable service accruing after 1 December 2012 for her unused sick leave. Riddick forfeited all 2.5833 years she attempted to convert to creditable service upon retirement from unused sick leave. This cause is remanded to the superior court with instructions to enter an order forfeiting all 2.5833 years of credited service from unused sick leave and for further remand with instructions to recalculate Riddick's accrued service and benefits as is consistent with this opinion. *It is so ordered.*

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

Judges BRYANT and COLLINS concur.

POUNDS v. PORTFOLIO RECOVERY ASSOCS., LLC

[274 N.C. App. 201 (2020)]

IRIS POUNDS, CARLTON MILLER, VILAYUAN SAYAPHET-TYLER, AND RHONDA HALL, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED, PLAINTIFFS
v.
PORTFOLIO RECOVERY ASSOCIATES, LLC, DEFENDANT

No. COA19-925

Filed 3 November 2020

1. Arbitration and Mediation—motion to compel arbitration—assignment of right to arbitrate—purchaser of credit card debts

In a class action against defendant-business, which obtained default judgments against the named plaintiffs after purchasing their credit card debts through bills of sale, the trial court properly denied defendant's motion to compel arbitration because no valid arbitration agreement existed between the parties where the original creditors did not assign defendant the right to arbitrate. The state laws governing plaintiffs' credit card agreements (Utah and South Dakota) required an express intent to specifically assign arbitration rights, which the bills of sale failed to demonstrate by only assigning plaintiffs' "accounts" and "receivables" and by not including language assigning "all" of the creditors' rights to defendant.

2. Uniform Commercial Code—assignment of credit card debt—Section 9-404—right to compel arbitration—not included

Where defendant-business purchased plaintiffs' credit card debts through bills of sale that did not expressly assign the original creditors' arbitration rights (under the credit card agreements) to defendant, Section 9-404 of the Uniform Commercial Code (U.C.C.)—providing that an assignee's rights are subject to all terms of the agreement between an account debtor and assignor—did not grant defendant a statutory right to arbitrate plaintiffs' consumer protection claims against it. Even if Section 9-404 applied to this case, the U.C.C. allows parties to vary its terms by agreement, and the bills of sale contractually limited the scope of the assignments to include only plaintiffs' accounts and receivables.

Appeal by Defendant from Order entered 21 March 2019 by Judge Michael O'Foghludha in Durham County Superior Court. Heard in the Court of Appeals 14 April 2020.

North Carolina Justice Center, by Jason A. Pikler, Carlene McNulty, and Emily P. Turner, J. Jerome Hartzell, Collum &

Perry, PLCC, by Travis E. Collum, Lapas Law Offices, PLLC, by Adrian M. Lapas, for plaintiffs-appellees.

Ellis & Winters LLP, by Jonathan A. Berkelhammer, Joseph D. Hammond, Michelle A. Liguori, and Carson Lane, for defendant-appellant.

HAMPSON, Judge.

Factual and Procedural Background

Portfolio Recovery Associates, LLC, (PRA) appeals from an Order denying PRA's Motion to Compel Arbitration (Order) entered on 21 March 2019. The Record reflects the following relevant facts:

PRA is in the business of purchasing delinquent consumer debt, and since 1 October 2009, PRA has filed over 1,000 lawsuits seeking enforcements of those debts in North Carolina courts.[1] Specific to this case, PRA purchased the debts of Iris Pounds, Carlton Miller, Vilayuan Sayaphet-Tyler, and Rhonda Hall (collectively, Plaintiffs) pursuant to a credit sale. PRA then filed individual lawsuits in various North Carolina courts against each Plaintiff and obtained default judgments in each of those actions against each Plaintiff on the debts.

On 21 November 2016, Plaintiffs[2] initiated this case by filing a "Class Action Complaint" (Complaint) against PRA alleging the default judgments obtained by PRA in North Carolina courts against both the named Plaintiffs and the proposed plaintiff class violated North Carolina's Consumer Economic Protection Act. Plaintiffs sought class action certification for the proposed class of "all persons against whom PRA obtained a default judgment entered by a North Carolina court in a case filed on or after October 1, 2009." Plaintiffs alleged the default judgments PRA obtained violated the Consumer Economic Protection Act, in part located at N.C. Gen. Stat. § 58-70-155, because PRA did not comply with certain statutorily enumerated prerequisites to obtain default judgments. Plaintiffs sought vacatur of the default judgments, statutory penalties pursuant to N.C. Gen. Stat. § 58-70-130(b), and recovery of amounts paid to PRA after entry of the default judgments. Plaintiffs

1. Facts alleged by Plaintiffs and admitted by PRA.

2. Pia Townes was originally a named party in this action; however, the judgment against Townes was since vacated by the Mecklenburg County District Court on 8 June 2016.

contemporaneously filed a Motion for Preliminary Injunction seeking to bar PRA from "enforcing or collecting on the default judgments . . . pending a final judgment by [the court] as to whether PRA's default judgments are void."

On 9 December 2016, PRA removed the case to the United States District Court for the Middle District of North Carolina on the basis of diversity jurisdiction under the Class Action Fairness Act of 2005. Plaintiffs moved for remand, arguing the federal district court lacked jurisdiction under the *Rooker-Feldman* doctrine, which limits the jurisdiction of federal courts to review valid state court judgments. On 28 March 2018, the federal district court entered a written Order concluding it lacked jurisdiction over Plaintiffs Pounds, Miller, Sayaphet-Tyler, and Hall, and thereby granted, in part, Plaintiffs' Motion to Remand. The federal district court remanded the case to Durham County Superior Court.[3]

On 31 May 2018, PRA responded to Plaintiffs' Complaint with its "Notice of Election to Arbitrate, Answer, and Counterclaims." On 29 June 2018, PRA filed an amended pleading captioned "Notice of Election to Arbitrate, Amended Answer, and Counterclaims." On or about 28 September 2018, the case was designated as an "exceptional case" pursuant to Rule 2.1 of North Carolina's General Rules of Practice and assigned to Superior Court Judge Michael O'Foghludha.

On 22 October 2018, Plaintiffs filed a Motion for Judgment on the Pleadings. On 11 January 2019, PRA moved to compel arbitration pursuant to the Federal Arbitration Act (FAA). In its supporting brief, PRA argued each of the arbitration agreements at issue was enforceable against the respective Plaintiff, and therefore the trial court should dismiss Plaintiffs' claims and, instead, compel arbitration. In opposition, Plaintiffs asserted PRA failed to meet its burden of demonstrating the existence of a valid, binding arbitration agreement as between Plaintiffs and PRA.

On 21 March 2019, the trial court entered its Order denying PRA's Motion to Compel Arbitration. In relevant part, the Order provided:

> 49. [T]he Court therefore finds that each Plaintiff entered into a credit card agreement with Synchrony that requires arbitration of disputes with Synchrony/GE, and that

3. Because Plaintiff Townes's default judgment had been vacated, the federal district court determined it had jurisdiction over her claim.

[Plaintiff] Sayaphet-Tyler also entered into a credit card agreement with Citibank that requires arbitration of disputes with Citibank.

. . . .

54. . . . The Court concludes based on the findings of the Court and the evidence presented that a valid contract or option to arbitrate was entered into between [P]laintiffs and the original creditors, at least as such relates to disputes between the [P]laintiffs and the original creditors.

55. Likewise, in this case, a second "necessarily antecedent statutory inquiry" is whether PRA has been assigned the rights created in the purported arbitration agreements and any delegation clauses contained therein. *New Prime Inc. v. Oliveira*, 139 S. Ct. 532, 538 (2019) (noting that the Court must always complete a "necessarily antecedent statutory inquiry").

. . . .

59. The Court further concludes that PRA, as a nonsignatory to the credit card agreement, has not proven it was assigned the right to arbitrate the current dispute in this case.

60. The question of whether PRA was assigned the right to enforce these agreements is governed by the choice of law provisions in each agreement. Accordingly, in assessing whether PRA can enforce the arbitration agreements, the Court applies Utah law to all the GE Bank agreements and South Dakota law to the Citibank agreement.

. . . .

65. This Court will interpret the Bills of Sale—as the available portion of the agreements between the original creditors and PRA—to determine if the parties manifested an intent to transfer the right to compel arbitration to PRA.

66. . . . The Bills of Sale state an intent to transfer to PRA either "the Receivables as set forth in the Notification Files (as defined in the [purchase] Agreement)" (for the GE Bank bills of sale) or "the Accounts described in Exhibit 1 and the final electronic file" for the Citibank bill of sale. Neither term is defined in the agreements.

. . . .

69. In the case of these [P]laintiffs, only the Hall credit agreement with GE and the Sayaphet-Tyler credit agreement with Citibank specifically grant assignees of the agreement the right to enforce the arbitration clause of the agreement. The Court concludes as a matter of law that the Pounds, Miller, and Sayaphet-Tyler GE agreements do not grant assignees of those agreements the right to enforce arbitration, as the mere sale and transfer of the receivable (the debt) to PRA did not transfer the right to arbitrate.

70. As to the Hall GE agreement, that agreement did specifically give the right to enforce the arbitration clause to assignees of the account. However, the Bill of Sale to PRA only sold and transferred the debt (the receivable) to PRA, not all of the rights and obligations of the original agreement. The Court concludes as a matter of law that the mere sale and transfer of the Hall receivable (the debt) did not transfer the right to arbitrate.

71. Although the language of the Sayaphet-Tyler Citibank Bill of Sale is broader than the Bills of Sale of the GE accounts, (the account is transferred, not merely the receivable), the Bill of Sale does not clearly indicate an intent to transfer the right to arbitrate any dispute, or indeed all of the rights and obligations of the original agreement. The Court concludes that the transfer of the account does not necessarily transfer the right to arbitrate. If Citibank and PRA had intended to transfer all of the rights and obligations of the original agreement, those parties could have taken care to so indicate in the agreement. The fact that they did not means th[at] PRA has not met its burden of showing that the plaintiffs in this case must arbitrate the current dispute(s).

. . . .

74. Given its conclusions in the foregoing paragraphs, and in consideration of the applicable state and federal law, the Court concludes that PRA is not a party entitled to enforce any arbitration agreement regarding any current Plaintiff in this case.

PRA timely filed Notice of Appeal from the trial court's Order on 2 April 2019.

Issue

The issue before this Court on appeal is whether the trial court erred in denying PRA's Motion to Compel Arbitration. This issue turns on the question of whether there was a valid arbitration agreement between Plaintiffs and PRA, which, in turn, hinges on whether PRA was assigned the right to arbitrate pursuant to the Bills of Sale.

Analysis

I. Appellate Jurisdiction and Standard of Review

Although "an appeal from the trial court's denial of a motion to compel arbitration is an interlocutory order[,]" *U.S. Trust Co., N.A. v. Stanford Grp. Co.*, 199 N.C. App. 287, 289, 681 S.E.2d 512, 513 (2009) (citation omitted), it is "well established that an order denying a motion to compel arbitration is immediately appealable." *Cornelius v. Lipscomb*, 224 N.C. App. 14, 16, 734 S.E.2d 870, 871 (2012).

> (a) On motion of a person showing an agreement to arbitrate and alleging another person's refusal to arbitrate pursuant to the agreement:
>
> . . . .
>
> (2) If the refusing party opposes the motion, the court shall proceed summarily to decide the issue and order the parties to arbitrate unless it finds that there is no enforceable agreement to arbitrate.

N.C. Gen. Stat. § 1-569.7(a)(2) (2019).

This Court has elaborated "the trial court must perform a two-step analysis requiring the trial court to ascertain both (1) whether the parties had a valid agreement to arbitrate, and also (2) whether the specific dispute falls within the substantive scope of that agreement." *U.S. Trust Co., N.A.*, 199 N.C. App. at 290, 681 S.E.2d at 514 (citations and quotation marks omitted). "[T]he trial court's findings regarding the existence of an arbitration agreement are conclusive on appeal where supported by competent evidence, even where the evidence might have supported findings to the contrary." *Ellis-Don Constr., Inc. v. HNTB Corp.*, 169 N.C. App. 630, 633-34, 610 S.E.2d 293, 296 (2005) (citations and quotation marks omitted). We review the trial court's conclusions of law de novo. *Hager v. Smithfield E. Health Holdings, LLC*, 264 N.C. App. 350, 354-55,

826 S.E.2d 567, 571 (2019) (citing *Creed v. Smith*, 222 N.C. App. 330, 333, 732 S.E.2d 162, 164 (2012)).

II. Arbitration Agreement Between the Parties

[1] Here, the parties do not dispute the trial court's determination there was a valid arbitration agreement between Plaintiffs and the original creditors as established in each Plaintiff's credit card agreement. At issue is the trial court's conclusion there was not a valid arbitration agreement between Plaintiffs and PRA on the basis PRA was not assigned arbitration rights when it purchased Plaintiffs' debts through the Bills of Sale. PRA contends the trial court's conclusion erred as a matter of law for several reasons. In broad strokes, PRA argues the trial court "misapplied basic contract law," "singled out arbitration rights for special, discriminatory treatment and resolved its doubts against the transfer of arbitration rights—both in violation of the FAA." PRA specifically contends it was entitled to arbitration under the express language in Plaintiff Hall's GE Bank Credit Card Agreement and Plaintiff Sayaphet-Tyler's Citibank Credit Card Agreement, and, further, the assignment of Plaintiffs' Accounts and Receivables, as effectuated by the Bills of Sale, necessarily or implicitly included the assignment of the right to arbitrate.

The United States Supreme Court has instructed "before referring a dispute to an arbitrator, the court determines whether a valid arbitration agreement exists." *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524, 530, 202 L. Ed. 2d 480, 487 (2019) (citation omitted). "[A] litigant who was not a party to the relevant arbitration agreement may invoke [Section] 3 [of the FAA] if the *relevant state contract law* allows him to enforce the agreement." *Arthur Andersen LLP v. Carlisle*, 556 U.S. 624, 632, 173 L. Ed. 2d 832, 841 (2009) (emphasis added). Therefore, as an initial matter and contrary to PRA's assertion, the trial court did not "misapply basic contract law" when it examined the relevant state contract law to instruct its analysis as to whether Plaintiffs and PRA had binding arbitration agreements. Thus, we must examine, as did the trial court, the "relevant state contract law" to determine if PRA is entitled to enforce the arbitration agreements contained in Plaintiffs' original credit card agreements against Plaintiffs. *See id.*

The parties agree with the trial court the relevant state contract law is the law of Utah for the GE Bank Agreements and South Dakota for the Citibank Agreement. Both Utah and South Dakota require proof of a valid arbitration agreement between parties before compelling arbitration. *Bybee v. Abdulla*, 2008 UT 35, ¶ 26, 189 P.3d 40, 47 (2008); *Mastellar*

v. Champion Home Builders Co., 2006 SD 90, ¶ 11, 723 N.W.2d 561, 564 (2006). Moreover, the party seeking to compel arbitration bears the burden of proving there is a valid arbitration agreement between the parties. *E.g.*, *McCoy v. Blue Cross and Blue Shield of Utah*, 2001 UT 31, ¶ 11, 20 P.3d 901, 904 (2001).

As such, whether a valid arbitration agreement exists under the applicable state law turns on whether PRA was assigned the right to arbitrate.

> Generally, the elements of an effective assignment include a sufficient description of the subject matter to render it capable of identification, and delivery of the subject matter, with the intent to make an immediate and complete transfer of all right, title, and interest in and to the subject matter to the assignee.

Gables v. Castlewood-Sterling, 2018 UT 04, ¶ 38, 417 P.3d 95, 107 (2018) (citations and quotation marks omitted). Likewise:

> It is the substance of the assignment rather than the form that is evaluated. Regardless of how it is made, an assignment must contain clear evidence of the intent to transfer rights, must describe the subject matter of the assignment, and must be noticed to the obligor.

Northstream Investments, Inc. v. 1804 Country Store Co., 2005 SD 61, ¶ 15, 697 N.W.2d 762, 766 (2005).

For purposes of this appeal, PRA became an assignee when it purchased Plaintiffs' debts; thus, here, the Bills of Sale are the operative assignment agreements. The GE Bills of Sale, which cover four of five the assignments at issue in the present case, provide:

> Seller hereby transfers, sells, conveys, grants, and delivers to Buyer, its successors and assigns, without recourse except as set forth in the Agreement, to the extent of its ownership, the *Receivables* as set forth in the Notification Files (as defined in the Agreement), delivered by Seller to Buyer . . . and as a further described in the Agreement.

(emphasis added). The Citibank Bill of Sale states: "Bank does hereby transfer, sell, assign, convey, grant, bargain, set over and deliver to Buyer, and to Buyer's successors and assigns, the *Accounts* described in Exhibit 1 and the final electronic file." (emphasis added). Although the language of the GE Bills of Sale indicates the Receivables are "as

set forth in the Notification Files (as defined in the Agreement)" and the Citibank Bill of Sale reflects the Accounts are "described in Exhibit 1 and the final electronic file" no such documents or files describing Plaintiffs' Accounts and Receivables are included in the Record.

Therefore, the pivotal question for this Court is *what* rights were assigned to PRA when it purchased Plaintiffs' Accounts and Receivables pursuant to the Bills of Sale. The trial court concluded, examining the relevant laws of Utah and South Dakota, the language of the Bills of Sale, and both parties' supporting arguments and briefs, the right to arbitrate Plaintiffs' claims was not included in the assignment of Plaintiffs' Receivables and Accounts. PRA contends the trial court's conclusion was error, arguing "numerous courts have held that an assign may enforce an arbitration agreement that is expressly enforceable by assigns, without requiring evidence that the assignors' arbitration rights transferred." In particular, PRA argues it was *expressly* assigned the right to arbitrate by Plaintiff Hall's GE Bank Agreement and Plaintiff Sayaphet-Tyler's Citibank Agreement and, further, that PRA was assigned the right to arbitrate all Plaintiffs' claims because the Bills of Sale assigned PRA all of the rights granted to the original creditors.

PRA first singles out Plaintiff Hall's GE Bank Agreement and Plaintiff Sayaphet-Tyler's Citibank Agreement and contends they were enforceable by PRA because the language of the two agreements themselves stated they were expressly enforceable by assigns. This is consistent with the trial court's Order, which found "only the Hall credit agreement with GE and the Sayaphet-Tyler credit agreement with Citibank specifically grant assignees of the agreement the right to enforce the arbitration clause of the agreement." However, PRA's argument the trial court's analysis should have concluded there is misplaced. Just because the original credit card agreements expressly contemplated that a future assignee may be assigned the right to compel arbitration does not relieve the future assignee from having to prove there was, in fact, an assignment of that right. Accordingly, as the trial court also recognized, the analysis for Plaintiff Sayaphet-Tyler's GE Bank Agreement and Plaintiff Hall's Citibank Agreement is the same as for the additional Plaintiffs; we turn to the language of the Bills of Sale themselves to determine what rights the original creditors assigned to PRA. PRA contends even if the Bills of Sale did not expressly assign the right to arbitration, the original creditors' right to arbitration was implicitly or necessarily assigned as part of the assignment of Plaintiffs' Accounts and Receivables.

Utah and South Dakota law both require express intent to assign identified rights or subject matter. Indeed, the Supreme Court of Utah

explained, "the elements of an effective assignment include[,]" *inter alia*, "a sufficient description of the subject matter to render it capable of identification" and "the intent to make an immediate and complete transfer of all right, title, and interest in and to the subject matter to the assignee." *Gables*, 2018 UT 04 at ¶ 38, 417 P.3d at 107 (citation and quotation marks omitted). Similarly, the South Dakota Supreme Court reiterated "an assignment must contain clear evidence of the intent to transfer rights [and] must describe the subject matter of the assignment[.]" *Northstream Investments, Inc.*, 2005 SD 61 at ¶ 15, 697 N.W.2d at 766.

A number of courts around the country—including some applying Utah and South Dakota law—have considered whether an assignment of debt necessarily or implicitly carries with it an assignment of the right to compel arbitration. Instructive is the United States District Court for the Northern District of Alabama's decision in *Lester v. Portfolio Recovery Assocs., LLC*, No. 1:18-CV-0267-VEH, 2018 WL 3374107 (N.D. Ala. 2018). The plaintiff in *Lester* defaulted on credit card debt originally owned by GE Bank (later Synchrony), who subsequently sold the debt to PRA. *Id.* at *2. The plaintiff's cardholder agreement included an arbitration provision and identified the FAA and Utah law as the relevant state law. *Id.* The *Lester* court considered an almost-identical question to the case at hand. In determining if PRA could compel arbitration on the plaintiff's claims, the *Lester* court examined the bill of sale,[4] which stated:

> Seller hereby transfers, sells, conveys, grants, and delivers to Buyer, its successors and assigns, without recourse except as set forth in the Agreement, to the extent of its ownership, *the Receivables* as set forth in the Notification Files (as defined in the Agreement), delivered by Seller to Buyer on [date], and as further described in the Agreement.

Id. The *Lester* court determined, applying the relevant Utah law, the defendant had not demonstrated the right to compel arbitration was included in the purchase of the plaintiff's debt as effectuated through the bill of sale and thus the original creditor "only transferred to PRA the right to collect Lester's receivable." *Id.* at *7.

PRA cites, *inter alia*, *Brooks v. N.A.R., Inc.*, No. 3:18-cv-362, 2019 WL 2210766 (N.D. Ohio 2019), for the proposition "numerous courts

4. This language is identical to the language of the GE Bills of Sale at issue in the case *sub judice*, save for the language relating to the date of the specific transaction.

have held that an assign may enforce an arbitration agreement that is expressly enforceable by assigns without requiring evidence that the assignors' arbitration rights transferred." Notably in *Brooks*, however, the federal district court determined "[a]long with the account itself, Crest *also assigned N.A.R. all of its rights*." *Id.* at *1. (emphasis added). The *Brooks* court, therefore, consistent with the trial court in the case *sub judice*, looked at the document effectuating the assignment to see what rights were assigned to the defendant. Although the assignment in *Brooks* did not expressly identify assignment of the specific right to arbitration, the assignment included the plaintiff's account and "all of [the original creditors] rights." *Id.* Thus, the assignment at issue in *Brooks* was more inclusive than the assignments in the present case that do not include such similar, additional catch-all language.

We are persuaded by the federal district court's reasoning in *Lester*. As detailed, Utah and South Dakota look for both the identification of and the intent to transfer rights to an assignee. *See Gables*, 2018 UT 04 at ¶ 38, 417 P.3d at 107; *Northstream Investments, Inc.*, 2005 SD 61 at ¶ 15, 697 N.W.2d at 766. Here, PRA purchased Plaintiffs' debts pursuant to the Bills of Sale, which specifically and solely identify the assignment of Plaintiffs' Accounts and Receivables. The Bills of Sale in this case contrast with the language of other bills of sale or purchase agreements where the documents effectuating the assignments expressly assign *all of the rights* of the original creditors to the assignee. *See Brooks*, No. 3:18-cv-362, 2019 WL 2210766, at *1 ("Along with the account itself, [original creditor] also assigned [the defendant] *all of its rights*." (emphasis added)); *James v. Portfolio Recovery Assocs., LLC*, No. 14-cv-03889-RMW, 2015 WL 720195, at *5 (N.D. Cal. 2015) ("[U]nder the express terms of the agreement, the assignment of the agreement to PRA affords PRA 'the same rights' as [original creditor] had under the agreement."); *Mark v. Portfolio Recovery Assocs., LLC*, No. 14-cv-5844, 2015 WL 1910527, at *3 (N.D. Ill. 2015) (where the "Bill of Sale and Assignment of Assets unambiguously assigns 'all of [its] right, title and interest in and to' the accounts purchased by PRA[,]" the federal district court concluded "[t]he plain and ordinary meaning of 'all of [its] right, title, and interest in and to' provides for an assignment of all of [original creditor's] rights under the Cardmember Agreement, including the arbitration provision"). Thus, we conclude the language contained in Plaintiffs' Bills of Sale does not identify the assignment of the right to arbitration nor does it demonstrate an intent of the parties to assign PRA "all of the rights" of the original creditors. Without more, the right to arbitrate against Plaintiffs was not implicitly assigned along with Plaintiffs' Accounts or Receivables.

[2] PRA also argues Section 9-404(a) of the Uniform Commercial Code, which has been adopted in both Utah and South Dakota, applies and compels the conclusion PRA was entitled to arbitration. Section 9-404, in part, provides:

> (a) Unless an account debtor has made an enforceable agreement not to assert defenses or claims, and subject to subsections (b) through (e), the rights of an assignee are subject to:
>
> (1) All terms of the agreement between the account debtor and assignor and any defense or claim in recoupment arising from the transaction that gave rise to the contract; and
>
> (2) Any other defense or claim of the account debtor against the assignor which accrues before the account debtor receives a notification of the assignment authenticated by the assignor or the assignee.

S.D. Codified Laws § 57A-9-404(a) (2019); Utah Code Ann. § 70A-9a-404(1) (2019). PRA contends it was transferred the right to compel arbitration under this statutory provision because its own rights under the assignment from the original creditors, under the UCC, are made subject to the same terms of the Plaintiffs' original credit card agreements.

Although the applicability of Section 9-404 under either Utah or South Dakota law to the present case is not extensively briefed before us, as an initial matter, the applicability of Section 9-404 to the present case is at least questionable. Indeed, Subsection (c) of Section 9-404 as adopted by both states provides: "This section is subject to law other than this article which establishes a different rule for an account debtor who is an individual and who incurred the obligation primarily for personal, family, or household purposes." S.D. Codified Laws § 57A-9-404(c); Utah Code Ann. § 70A-9a-404(3).

Moreover, it appears PRA's argument on this point is contrary to the purpose of Section 9-404. The purpose of Section 9-404(a) is to define and limit the defenses and claims that may be asserted against an assignee by an account debtor, including by preserving any claims or defenses an account debtor may assert under the terms of the original agreement against an assignee. *See*, *e.g.*, S.D. Codified Laws § 57A-9-404 cmt. 3. Nowhere in this Section does it mandate the terms of every assignment—no matter the express terms of the actual assignment—from the original debtor to an assignee.

Indeed, even assuming PRA's reading of this Section is correct and Section 9-404(a) is designed to be a broad grant of rights under an assignment to the assignee and is applicable to agreements like the one in this case, the UCC also recognizes parties have the right to vary its terms by agreement. *See* Utah Code § 70A-1a-302(1) ("Except as otherwise provided . . . the effect of provisions of this title may be varied by agreement"); S.D. Codified Laws § 57A-1-302(a) (same); *see also Pine Top Receivables of Ill., LLC v. Banco de Seguros del Estado*, 771 F.3d 980, 992 (7th Cir. 2014) ("The provisions of the UCC on which [the plaintiff] relies cover contractual language assigning 'the contract' or 'all my rights under the contract.' If an assignment includes such language, the UCC tells us that the transfer is subject to 'all terms of the agreement.' " (citing 810 ILCS 5/9-404(a))).

However, as Plaintiffs argue and we have discussed *supra*, the very terms of the Bills of Sale at issue in the present case contractually limit the scope of the assignments—they assign PRA *only* Plaintiffs' Accounts and Receivables. As such, application of Section 9-404 does not alter our analysis. Therefore, consistent with both Utah and South Dakota law, the key inquiry remains unchanged: Whether the right to arbitrate was included in the assignment of Plaintiffs' Accounts and Receivables as effectuated by the Bills of Sale. The trial court properly concluded under the laws of South Dakota and Utah and based on the terms of the Bills of Sale themselves, the right to arbitrate was not transferred by implication or by necessity along with the Accounts and Receivables.

Consequently, we conclude, as did the trial court, without any showing of the additional intent by the original creditors to assign to PRA, at the very least, "all of the rights and obligations" of the original agreements, the right to arbitrate was not assigned in the sale and assignment of the Plaintiffs' Accounts and Receivables as set forth in the Bills of Sale. The trial court correctly concluded PRA has not met its burden of showing a valid arbitration agreement between each Plaintiff and PRA and did not err when it denied PRA's Motion to Compel Arbitration.

Conclusion

Accordingly, for the foregoing reasons, the trial court's Order is affirmed.

AFFIRMED.

Judges STROUD and ARROWOOD concur.

STATE OF NORTH CAROLINA
v.
CHRISTINA ANN BOWMAN

No. COA20-237

Filed 3 November 2020

1. Constitutional Law—effective assistance of counsel—concession to lesser-included offense—Harbison inquiry—informed consent

In a trial for first-degree burglary, even if defense counsel's closing argument impliedly admitted defendant's guilt of the lesser-included offense of misdemeanor breaking or entering, that concession did not constitute per se ineffective assistance of counsel where the record showed the trial court conducted a *Harbison* inquiry, during which defendant gave consent to counsel's strategy of "admitting to everything but intent" for the burglary.

2. Criminal Law—prosecutor's closing argument—impugning defense expert's credibility—improper—not reversible

In defendant's trial for first-degree burglary, the prosecutor's statements during closing that the defense expert in forensic psychology had been paid by the defense "to give good stuff" and "to say good things for the defense" were clearly improper since they suggested that the expert was paid to make up an excuse for defendant's behavior, but did not constitute reversible error given the significant evidence of defendant's intent to commit burglary.

3. Attorney Fees—criminal case—civil judgment—notice and opportunity to be heard

A civil judgment for attorney fees entered after defendant was convicted of first-degree burglary was vacated and the matter remanded to the trial court. Defendant was deprived of a meaningful opportunity to be heard before the judgment was entered because even though she stated she had no objection after being informed that a judgment would be entered and what her appointed counsel's hourly fee was, she was not yet aware of the number of hours her counsel planned to submit or the total amount she would owe when she gave her agreement.

Appeal by Defendant from judgment entered 24 September 2019 by Judge Richard Kent Harrell in Carteret County Superior Court. Heard in the Court of Appeals 6 October 2020.

Attorney General Joshua H. Stein, by Assistant Attorney General Sarah N. Cibik, for the State-Appellee.

Richard J. Costanza for Defendant-Appellant.

COLLINS, Judge.

Defendant Christina Ann Bowman appeals from judgment entered upon a jury verdict of guilty of first-degree burglary. Defendant argues that (1) she was denied effective assistance of counsel because her trial counsel conceded her guilt to the lesser-included offense of misdemeanor breaking or entering without her consent, (2) the trial court erred by failing to intervene ex mero motu to address the prosecutor's attack on the credibility of Defendant's expert witness during closing argument, and (3) the trial court erred by denying her the opportunity to be heard prior to the entry of a civil judgment for attorneys' fees. We discern no error in defense counsel's remarks and no reversible error in the trial court's failure to intervene ex mero motu to address the prosecution's improper remarks. We vacate the civil judgment for attorneys' fees and remand the matter to allow Defendant to waive further proceedings or to request an opportunity to be heard.

I. Procedural History

On 11 March 2019, Defendant was indicted on one count of first-degree burglary. Defendant was tried before a jury in Carteret County Superior Court from 23 to 24 September 2019. The jury found Defendant guilty of first-degree burglary and the trial court sentenced Defendant to an active term of 59 to 83 months' imprisonment on 24 September 2019. The trial court then entered a civil judgment against Defendant for attorneys' fees and other expenses on 25 September 2019. On 26 September 2019, Defendant gave written notice of appeal from her conviction for first-degree burglary.

II. Factual Background

The evidence at trial tended to show the following: In December 2018, Ginger and Milton Boyd resided in Morehead City with their two children. The home was situated at the back of a two-acre lot and is accessible by a dirt road. It was surrounded by homes owned by other members of the Boyd family.

At approximately 5:30 to 6:00 a.m. on 10 December 2018, Ginger Boyd saw a flash from a flashlight inside her bathroom. When she went to investigate, she encountered Defendant standing in the living room.

Defendant initially claimed that she was an emergency medical services responder there to assist a dead person on the couch. Defendant had never been in the Boyd home and was not invited. At that point, Mrs. Boyd grabbed Defendant's arms, pushed her against the wall, and screamed for her husband, Milton Boyd. Mrs. Boyd believed that Defendant was under the influence of an impairing substance.

Milton Boyd had never seen Defendant before. When he came into the living room in response to Mrs. Boyd's call, he saw that she had restrained Defendant to prevent her from leaving. Mr. Boyd proceeded to take hold of Defendant. Defendant pointed to Mrs. Boyd's purse, claimed it was hers, and said she wanted to leave. Mr. Boyd believed that Defendant was coherent and was not intoxicated with alcohol, but could not say whether she was under the influence of any drugs.

The Boyds' minor son, who was sleeping on the couch, woke up to his mother yelling at Defendant and indicated that Defendant was making up stories.

The Boyds' daughter, Jessica, was awakened by the screaming, and when she came downstairs, she recognized Defendant because they had been roommates eight years prior. Defendant began to insist that she was there to assist different members of the Boyd family. Jessica called 911. She also believed Defendant was under the influence.

While waiting for officers to respond, Mrs. Boyd called her brother-in-law to restrain Defendant while she and her husband got dressed. During that time Defendant struggled to leave and claimed that the Boyds were hurting her arm. Defendant alternately explained that someone had chased her or someone had asked her to come to the house.

Carteret County Sheriff's Deputies Christopher Kuzynski and Jordan Byrd responded to the 911 call. When they arrived, the two arrested Defendant. When Byrd asked Defendant why she was in the Boyd home, she initially responded that she was attacked by two others who chased her, shot at her, and jumped her. Upon further questioning, Defendant told Byrd that she had gone inside the Boyd home to check on an injured person.

Kuzynski believed that Defendant appeared "a little lethargic" and thought she was under the influence of a substance other than alcohol. Byrd recognized Defendant from a previous arrest for breaking or entering. After that arrest, she was involuntarily committed because she had told police that voices in her head led her to enter the home. In contrast to the previous arrest, Byrd believed that Defendant was more coherent

on the night of 10 December, though she still claimed that voices were guiding her.

After the deputies arrived and took Defendant into custody, they returned to the Boyd home to collect Defendant's belongings. Defendant's wallet was found in Mrs. Boyd's purse alongside loan documents, wireless headphones, and other items belonging to the Boyds which had been stored in vehicles outside the Boyd home. The purse had been moved from the hook where Mrs. Boyd kept it to the kitchen table.

At trial, Defendant called Dr. Amy James as an expert in forensic psychology. She testified that she interviewed Defendant and reviewed court records, police records, involuntary commitment records, and medical records. Based upon this examination, Dr. James diagnosed Defendant with post-traumatic stress disorder, severe alcohol use disorder, severe amphetamine use disorder, and a personality disorder. She testified that Defendant admitted to using methamphetamine daily; use of the drug can result in a methamphetamine-associated psychosis which presents with delusions, paranoia, and hallucinations; and Defendant's symptoms were congruent with this condition.

The jury found Defendant guilty of first-degree burglary. The trial court entered judgment upon the jury's verdict, sentencing Defendant to 59 to 83 months' imprisonment, and entered a civil judgment against Defendant for attorneys' fees and other expenses. Defendant gave written notice of appeal from the judgment entered upon her conviction for first-degree burglary.

III. Appellate Jurisdiction

Defendant's written notice of appeal was sufficient to confer jurisdiction on this Court to review the criminal judgment. *See* N.C. Gen. Stat. § 7A-27(b)(1); N.C. R. App. P. 4(a)(2). However, Defendant's written notice of appeal was limited to the criminal judgment, and is therefore insufficient to confer jurisdiction on this Court to review the civil judgment for attorneys' fees. *See* N.C. R. App. P. 3(a). This issue is subject to dismissal.

Contemporaneously with his opening brief, Defendant filed a petition for writ of certiorari, acknowledging the deficiency in his notice of appeal and asking this Court issue a writ of certiorari to review the civil judgment for attorneys' fees. We exercise our discretion under N.C. R. App. P. 21(a) and issue a writ of certiorari to review the issues pertaining to the civil judgment for attorneys' fees. *E.g.*, *State v. Friend*, 257 N.C. App. 516, 519, 809 S.E.2d 902, 905 (2018) (issuing a writ of certiorari to

review a civil judgment for attorneys' fees where the defendant's arguments were meritorious).

IV. Discussion

A. Ineffective Assistance of Counsel

[1] Defendant first argues that her trial counsel implicitly conceded that she was guilty of misdemeanor breaking or entering, denying her right to effective assistance of counsel. We review whether a defendant was denied effective assistance of counsel de novo. *State v. Foreman*, 842 S.E.2d 184, 187 (N.C. Ct. App. 2020).

A defendant claiming ineffective assistance of counsel must ordinarily show both that counsel's performance was deficient and that counsel's deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Defense counsel's admission of the defendant's guilt of a charged offense to the jury without the defendant's consent, however, is per se ineffective assistance of counsel. *State v. Harbison*, 315 N.C. 175, 180, 337 S.E.2d 504, 507-08 (1985).

"Although an overt admission of the defendant's guilt by counsel is the clearest type of *Harbison* error, it is not the exclusive manner in which a per se violation of the defendant's right to effective assistance of counsel can occur." *State v. McAllister*, No. 221A19, 2020 WL 5742615, at *13 (N.C. Sept. 25, 2020). *Harbison* error also occurs where "defense counsel impliedly concedes his client's guilt without prior authorization." *Id.* at *12.

"Our Supreme Court has 'previously declined to set out what constitutes an acceptable consent by a defendant in this context.' " *State v. Perry*, 254 N.C. App. 202, 212, 802 S.E.2d 566, 574 (2017) (quoting *State v. McDowell*, 329 N.C. 363, 387, 407 S.E.2d 200, 213 (1991)). "[A]n on-the-record exchange between the trial court and the defendant is the preferred method of determining whether the defendant knowingly and voluntarily consented to an admission of guilt," but our courts have "declined to define such a colloquy as the sole measurement of consent or to set forth strict criteria for an acceptable colloquy." *State v. Thompson*, 359 N.C. 77, 120, 604 S.E.2d 850, 879 (2004). A defendant may consent to his counsel's concession of guilt at trial without the same formalities that apply to a defendant's guilty plea. *See State v. Maready*, 205 N.C. App. 1, 7, 695 S.E.2d 771, 776 (2010) (distinguishing statutory requirements for a defendant's entry of a guilty plea). "For us to conclude that a defendant permitted his counsel to concede his guilt to a lesser-included crime, the facts must show, at a minimum, that

defendant knew his counsel were going to make such a concession." *State v. Matthews*, 358 N.C. 102, 109, 591 S.E.2d 535, 540 (2004); *see also State v. Thomas*, 327 N.C. 630, 631, 397 S.E.2d 79, 80 (1990) (remanding case to superior court for an evidentiary hearing to determine whether defendant knowingly consented to trial counsel's concessions of defendant's guilt to the jury).

Defendant was indicted for first-degree burglary under N.C. Gen. Stat. § 14-51. "Misdemeanor breaking or entering is a lesser-included offense of first-degree burglary." *State v. Mangum*, 158 N.C. App. 187, 196, 580 S.E.2d 750, 756 (2003). Conviction for misdemeanor breaking or entering therefore "requires only proof of wrongful breaking or entry into any building." *State v. O'Neal*, 77 N.C. App. 600, 606, 335 S.E.2d 920, 924 (1985); *see also* N.C. Gen. Stat. § 14-54(b) (2019) ("Any person who wrongfully breaks or enters any building is guilty of a Class 1 misdemeanor."). The trial court accordingly instructed the jury that if it did not find Defendant guilty of first-degree burglary, it must consider whether she was guilty of misdemeanor breaking or entering.

In his opening statement, counsel reminded the jury that it was the State's burden to prove that Defendant "had the specific intent to commit a larceny or a felony when she entered the Boyds' home on that morning." Counsel contended that "[t]he evidence shows that she was confused about why she was there[,]" and asked the jury "whether a person in a normal mental state would use [the explanation provided by Defendant] for their presence."[1]

In closing, defense counsel argued that the State failed to show Defendant had the requisite intent to support a first-degree burglary conviction. Counsel conceded on multiple occasions that Defendant had entered the Boyd home and reminded the jury of the State's burden to prove Defendant's intent "when she entered the Boyds' home that morning." He argued that "she was confused about why she was there[,]" and contended the evidence showed that Defendant's actions were "not the actions of a coherent burglar . . . ." Counsel asked the jury, "Can you really determine beyond a reasonable doubt that [Defendant] entered the Boyds' home to steal?" In concluding, counsel asked the jury to find Defendant "not guilty of first-degree burglary."

Even presuming, without deciding, that counsel impliedly admitted Defendant's guilt to misdemeanor breaking or entering, he did so with

1. The trial court ruled that this and several other remarks in counsel's opening statement were impermissibly argumentative, but did not instruct the jury to disregard the remarks.

Defendant's consent. Prior to defense counsel's opening statement, the trial court asked whether there were "[a]ny *Harbison* issues that we need to deal with?" Defense counsel responded that "we'll be admitting to everything but intent." At that point, the trial court addressed Defendant directly:

> THE COURT: . . . Ms. Bowman, you've heard [counsel] indicate that the issue that they intend to make is intent; that they'll be admitting the other elements of the offense. Do you understand that?
>
> DEFENDANT: Yes, sir.
>
> THE COURT: All right. Do you agree with that?
>
> DEFENDANT: Yes, sir.

It is clear that "defendant knew [her] counsel [was] going to make such a concession." *Matthews*, 358 N.C. at 109, 591 S.E.2d at 540. The trial court's colloquy with Defendant demonstrated that Defendant knew her counsel planned to admit to all the elements of first-degree burglary except intent, understood, and agreed with this strategy.

Our Supreme Court held that a similar colloquy established that the defendant had consented to his counsel's concessions. *See Thompson*, 359 N.C. at 118, 604 S.E.2d at 878-79. In *Thompson*, defense counsel informed the trial court on the record and in the defendant's presence that he intended to "acknowledg[e] responsibility in these cases." *Id.* The trial court then directly addressed the defendant and confirmed that he agreed with the strategy of making the admissions. *Id.* at 118-19; 604 S.E.2d at 878-79. Here, as in *Thompson*, Defendant acknowledged that she understood and agreed to counsel's strategy on the record. Defendant has therefore failed to demonstrate per se ineffective assistance of counsel under *Harbison*.[2]

B. Prosecution's Closing Remarks

[2] Defendant also argues that the trial court erred by failing to intervene ex mero motu when the prosecutor attacked the credibility of Defendant's forensic psychology expert during her closing argument.

---

2. Ordinarily, when we do not find per se ineffective assistance of counsel under *Harbison*, "the issue concerning ineffective assistance of counsel should be examined pursuant to the normal ineffectiveness standard set forth in *Strickland v. Washington* . . . ." *State v. McDowell*, 329 N.C. 363, 387, 407 S.E.2d 200, 213 (1991). We do not reach this analysis, however, because Defendant argued only that her counsel's conduct amounted to per se ineffective assistance.

"The standard of review for improper closing arguments that provoke timely objection from opposing counsel is whether the trial court abused its discretion by failing to sustain the objection." *State v. Jones*, 355 N.C. 117, 131, 558 S.E.2d 97, 106 (2002). But "when defense counsel fails to object to the prosecutor's improper argument and the trial court fails to intervene, the standard of review requires a two-step analytical inquiry: (1) whether the argument was improper; and, if so, (2) whether the argument was so grossly improper as to impede the defendant's right to a fair trial." *State v. Huey*, 370 N.C. 174, 179, 804 S.E.2d 464, 469 (2017). Only where we find "both an improper argument and prejudice will this Court conclude that the error merits appropriate relief." *Id.*

In a criminal trial, counsel's remarks are improper if he "become[s] abusive, inject[s] his personal experiences, express[es] his personal belief as to the truth or falsity of the evidence or as to the guilt or innocence of the defendant, or make[s] arguments on the basis of matters outside the record except for matters concerning which the court may take judicial notice." N.C. Gen. Stat. § 15A-1230 (2019). "Within these statutory confines, we have long recognized that prosecutors are given wide latitude in the scope of their argument and may argue to the jury the law, the facts in evidence, and all reasonable inferences drawn therefrom." *Huey*, 370 N.C. at 180, 804 S.E.2d at 469 (quotation marks omitted).

Our courts have frequently addressed the propriety of arguments attacking the credibility of expert witnesses. "[I]t is proper for an attorney to point out potential bias resulting from payment a witness received or would receive for his services," but "it is improper to argue that an expert should not be believed because he would give untruthful or inaccurate testimony in exchange for pay." *Id.* at 183, 804 S.E.2d at 471-72; *accord State v. Rogers*, 355 N.C. 420, 462-63, 562 S.E.2d 859, 885 (2002). Counsel must not go so far as "to insinuate that the witness would perjure himself or herself for pay." *Rogers*, 355 N.C. at 463, 562 S.E.2d at 885.

"For an appellate court to order a new trial, the relevant question is whether the prosecutors' comments so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Huey*, 370 N.C. at 180, 804 S.E.2d at 470 (quotation marks and citations omitted). "In determining whether a prosecutor's statements reached this level of gross impropriety, we consider the statements 'in context and in light of the overall factual circumstances to which they refer.' " *Id.* (quoting *State v. Alston*, 341 N.C. 198, 239, 461 S.E.2d 687, 709 (1995)). Where the context shows "overwhelming evidence against a defendant,

we have not found statements that are improper to amount to prejudice and reversible error." *Id.* at 181, 804 S.E.2d at 470.

At trial, Dr. James testified for the defense as an expert in forensic psychology. On cross examination, Dr. James acknowledged that she was paid for her time by the State, on behalf of Defendant. Dr. James indicated that she is paid flat rates for time traveling, time spent in court, and time actually testifying. With these facts in evidence, the prosecutor was permitted "to point out potential bias resulting from payment a witness received or would receive for his services." *Id.* at 183, 804 S.E.2d at 471.

In her closing argument, the prosecutor addressed the issue of intent and attacked the credibility of Dr. James's testimony. The prosecutor said that "psychosis is quite convenient as an excuse" for Defendant' actions. She argued that Defendant "had Dr. James come and testify . . . with the end in mind"; that she was "paid by the defense, for the defense, to give good stuff for the defense"; and that "[y]ou get what you put out. What you put in, you get out." After questioning the utility of Dr. James's diagnoses of Defendant, the prosecutor remarked to the jury, "So I ask you to take that for what it is. At the end of the day, hired by the defense, for the defense, to say good things for the defense . . . ." Defendant failed to object to any of these remarks.

These remarks were improper because they went beyond permissibly arguing that an expert witness was potentially biased. *Id.* The prosecution impermissibly suggested to the jury that Defendant's psychological expert was paid to fabricate an excuse for Defendant's conduct and acts, regardless of the truth. By arguing that psychosis was an "excuse," Dr. James testified with an end in mind, Dr. James was paid "to give good stuff for the defense," and Dr. James was hired "to say good things for the defense," the prosecutor inappropriately suggested that Dr. James "should not be believed because [s]he would give untruthful or inaccurate testimony in exchange for pay." *Id.* at 183, 804 S.E.2d 472.

The prosecution's remarks impugning the defense expert's credibility in this case are substantively equivalent to those the Court held improper in *Huey*. There, the prosecution stated that (1) the defendant was the psychiatric expert's "client," (2) the expert "works for the defendant" and was "not an impartial mental-health expert," (3) the expert "has a specific purpose, and he's paid for it," (4) the expert was a "$6,000 excuse man," and (5) the expert had done "exactly what he was paid to do." *Id.* at 178, 804 S.E.2d at 468. As discussed above, the prosecution's remarks in this case had the same tenor, and were therefore improper.

Still, while the remarks were clearly improper, in the absence of any objection thereto by Defendant, they were not so grossly improper as to impede the defendant's right to a fair trial. *Id.* at 179, 804 S.E.2d at 469. Similar remarks have been held not to amount to prejudicial, and therefore reversible, error. *See*, *e.g.*, *State v. Campbell*, 359 N.C. 644, 677, 617 S.E.2d 1, 22 (2005) (prosecutor's characterization of the defense expert as a "witness that the defendant could buy" was not grossly improper); *Rogers*, 355 N.C. at 460-61, 562 S.E.2d at 884-85 (prosecutor's remarks that "it's a crying shame when education is corrupted for filthy lucre, it's a crying shame when people who've got the education abuse it" and "saying [something] doesn't make it so cause you can pay somebody to say anything" were not so grossly improper as to require the trial court to intervene ex mero motu); *State v. Murillo*, 349 N.C. 573, 604-05, 509 S.E.2d 752, 770-71 (1998) (prosecutor's remarks that "[i]t is a sad state of our legal system, that when you need someone to say something, you can find them. You can pay them enough and they'll say it," even if improper, were not prejudicial).

Moreover, we cannot conclude that the prosecution's remarks were so prejudicial as to merit a new trial considering the substantial amount of evidence tending to show that Defendant had the requisite intent for first-degree burglary. Numerous witnesses for the State testified that Defendant had entered the Boyd home on the night in question. The home was located on a secluded private property, which would have required Defendant to travel down a curved dirt road. Defendant had taken items belonging to the Boyds from cars on the Boyd property and put them inside Ginger Boyd's purse, along with Defendant's own wallet. When Mrs. Boyd found Defendant in the house, Defendant was in the living room and had a flashlight. The jury also heard Rule 404(b) evidence about Defendant's previous break in, which the court instructed the jury was "solely for the purpose of showing the identity of the person who committed the crime charged in this case, . . . that the defendant had the intent, . . . or that there existed in the mind of the defendant a plan, scheme, system, or design . . . ." Because the record reveals significant evidence on the question of Defendant's intent, the prosecutor's improper remarks concerning Defendant's expert were not sufficiently prejudicial to require reversal. *See Huey*, 370 N.C. at 181, 804 S.E.2d at 470.

C. Civil Judgment on Attorneys' Fees

[3] Finally, Defendant challenges the trial court's entry of a civil judgment on attorneys' fees outside of her presence.

In certain circumstances, a trial court may enter a judgment requiring an indigent defendant to pay for a portion of the cost of legal services provided by appointed counsel. *See* N.C. Gen. Stat. § 7A-455 (2019).

> [B]efore entering money judgments against indigent defendants for fees imposed by their court-appointed counsel under N.C. Gen. Stat. § 7A-455, trial courts should ask defendants—personally, not through counsel—whether they wish to be heard on the issue. Absent a colloquy directly with the defendant on this issue, the requirements of notice and opportunity to be heard will be satisfied only if there is other evidence in the record demonstrating that the defendant received notice, was aware of the opportunity to be heard on the issue, and chose not to be heard.

Friend, 257 N.C. App. at 523, 809 S.E.2d at 907.

The trial court informed Defendant that it intended to impose a civil judgment for attorneys' fees, that appointed counsel's fee would be $75 per hour, and that it would enter the civil judgment against her once counsel had submitted an affidavit setting forth his time in the case. When asked, Defendant stated that she had no objection to entry of the civil judgment. But because Defendant did not know either the number of hours her appointed counsel planned to submit or the consequent amount she would owe, Defendant was deprived of a meaningful opportunity to be heard before the judgment was entered.

In light of these facts, the State has informed the Court in its brief that it "does not oppose Defendant's request that this matter be remanded to the trial court exclusively on the issue of the civil judgment for attorney's fees." We agree that vacating the civil judgment and remanding to the trial court for a waiver by Defendant or a hearing on the issue of attorneys' fees is the appropriate remedy. *See State v. Jacobs*, 172 N.C. App. 220, 236, 616 S.E.2d 306, 317 (2005) (vacating and remanding a civil judgment for attorneys' fees where there was "no indication in the record that defendant was notified of and given an opportunity to be heard regarding the appointed attorney's total hours or the total amount of fees imposed").

V. Conclusion

Even presuming that trial counsel conceded Defendant's guilt to a charged offense, we find no *Harbison* error because counsel acted with Defendant's consent. Though the prosecutor's remarks attacking the credibility of Defendant's expert witness were improper, they were

not so grossly improper as to impede Defendant's right to a fair trial. We vacate the civil judgment for attorneys' fees and remand to the trial court to allow Defendant to either waive further proceedings or be given an opportunity to be heard on the matter.

NO ERROR IN PART; VACATED AND REMANDED IN PART.

Judges BRYANT and TYSON concur.

STATE OF NORTH CAROLINA
v.
CAROLYN VONDESSA DOSS, DEFENDANT, AND ACCREDITED SURETY AND CASUAL, SURETY/BAIL AGENT/APPELLANT

No. COA20-43

Filed 3 November 2020

Penalties, Fines, and Forfeitures—bond forfeiture—motion to set aside—imposition of sanctions

In a proceeding to set aside a bond forfeiture where the trial court granted the bail agent's motion to set aside but also ordered him to pay a monetary sanction for failure to attach sufficient documentation to the motion and prohibited him from becoming surety on future bonds until payment was made, the order imposing sanctions was reversed. The trial court abused its discretion in ordering sanctions because, by the plain language of N.C.G.S. § 15A-544.5(d)(8), the court could only impose sanctions if the motion to set aside had been denied. Additionally, the school board failed to follow statutory requirements to make a proper motion for sanctions, the sanction prohibiting the bail agent from becoming a surety on future bonds exceeded the scope of the trial court's statutory authority, and the court failed to make findings concerning why the motion—which had attached to it a printout of an official electronic court record—contained insufficient documentation.

Appeal by surety-bail agent-appellant from order entered 25 October 2019 by Judge William B. Sutton in Jones County District Court. Heard in the Court of Appeals 26 August 2020.

Greene, Wilson & Crow, P.A., by Kelly L. Greene and Thomas R. Wilson, for appellant Accredited Surety and Casual.

Tharrington Smith LLP, by Rod Malone and Stephen G. Rawson, for appellee Jones County Board of Education.

Campbell Shatley, PLLC, by Christopher Z. Campbell, Kristopher L. Caudle, and John F. Henning, Jr., for North Carolina School Boards Association.

Allison B. Schafer for North Carolina School Boards Association.

BERGER, Judge.

On October 25, 2019, the trial court entered an order which granted Reginal Beasley's ("Bail Agent") and Accredited Surety and Casual's motion to set aside forfeiture. However, the trial court also ordered Bail Agent to pay sanctions in the amount of $500.00 because Bail Agent failed to attach sufficient documentation with its motion pursuant to N.C. Gen. Stat. § 15A-544.5. In addition, the trial court prohibited Bail Agent from becoming surety on any future bonds in Jones County until the judgment was satisfied. Bail Agent appeals, arguing that the trial court abused its discretion when it granted Jones County Board of Education's (the "Board") motion for sanctions. We agree, and reverse the trial court's order for sanctions.

Factual and Procedural Background

On July 14, 2018, Carolyn Vondessa Doss ("Defendant") was arrested for driving while impaired, placed in jail, and given a secured bond of $4,000.00. That same day, Accredited Surety and Casual, through its agent Bail Agent, posted bond in the amount of $4,000.00, and Defendant was released. On November 2, 2018, Defendant failed to appear, and an order for her arrest was issued. On November 10, 2018, the trial court issued and mailed a bond forfeiture notice to Accredited Surety and Casual, Bail Agent, and Defendant.

On March 29, 2019, Bail Agent filed a motion to set aside forfeiture using form AOC-CR-213. As grounds for relief, Bail Agent checked boxes 2 – "All charges for which the defendant was bonded to appear have been finally disposed by the court other than by the State taking a dismissal with leave as evidenced by the attached copy of the official court record" – and 4 – "The defendant has been served with an order for arrest for the failure to appear on the criminal charge in the case in question as evidenced by a copy of an official court record, including

an electronic record."[1] An Automated Criminal/Infractions System ("ACIS") printout showing that Defendant had been assigned a new court date was attached to the motion.

On April 12, 2019, the Board filed its objection to the motion, and noticed hearing for May 10, 2019. The left margin contained the following typed language: "Surety shall take notice that the Board of Education reserves the right to seek, as a sanction, reimbursement of all attorney fees and expenses incurred in objecting to this motion if Surety provides additional documentation after the date of this objection."

Prior to the hearing on the Board's objection to the motion to set aside, Bail Agent provided the Board's counsel with additional documentation that demonstrated the order for arrest had been served. The record does not contain a written motion for sanctions or notice of hearing on the issue of sanctions from the Board.

On October 25, 2019, the Board's objection to Bail Agent's motion was heard. At the hearing, the Board's counsel conceded that the additional documentation was sufficient to set aside forfeiture, and the trial court granted Bail Agent's motion to set aside. The trial court also ordered sanctions against Bail Agent in the amount of $500.00 for failure to attach sufficient documentation to the motion to set aside. Further, the trial court prohibited Bail Agent from becoming "surety on any bail bond in Jones County until" Bail Agent satisfied the judgment.

Bail Agent appeals, arguing that the trial court abused its discretion in assessing sanctions. We agree.

Standard of Review

A trial court's ruling on imposition of sanctions will not be disturbed absent an abuse of discretion. *State v. Cortez*, 229 N.C. App. 247, 267, 747 S.E.2d 346, 360 (2013). "A trial court abuses its discretion if its determination is manifestly unsupported by reason and is so arbitrary that it could not have been the result of a reasoned decision." *State v. Cummings*, 361 N.C. 438, 463, 648 S.E.2d 788, 803 (2007) (citation and quotation marks omitted).

1. Bail Agent claims that box 2 was checked accidentally, and Bail Agent attempted to cure this mistake by initialing above box 2.

Analysis

"The goal of the bonding system is the production of the defendant, not increased revenues for the county school fund." *State v. Locklear*, 42 N.C. App. 486, 489, 256 S.E.2d 830, 832 (1979).

"A statute that is clear on its face must be enforced as written." *State v. Moraitis*, 141 N.C. App. 538, 541, 540 S.E.2d 756, 757 (2000). "As a cardinal principle of statutory interpretation, if the language of the statute is clear and is not ambiguous, we must conclude that the legislature intended the statute to be implemented according to the plain meaning of its terms." *State v. Reaves-Smith*, 271 N.C. App. 337, 343, 844 S.E.2d 19, 24 (2020) (citation and quotation marks omitted).

> It is a well-established rule of statutory construction that a statute must be considered as a whole and construed, if possible, so that none of its provisions shall be rendered useless or redundant. It is presumed that the legislature . . . did not intend any provision to be mere surplusage.

State v. Conley, 374 N.C. 209, 215, 839 S.E.2d 805, 809 (2020) (citation and quotation marks omitted).

N.C. Gen. Stat. § 15A-544.5(d)(8) states that

> If at the hearing [on the motion to set aside] the court determines . . . that the documentation required to be attached . . . was not attached to the motion at the time the motion was filed, the court may order monetary sanctions against the surety filing the motion, unless the court also finds that the failure to sign the motion or attach the required documentation was unintentional. A motion for sanctions and notice of the hearing thereof shall be served on the surety not later than 10 days before the time specified for the hearing. If the court concludes that a sanction should be ordered, in addition to ordering the denial of the motion to set aside, sanctions shall be imposed as follows: (i) twenty-five percent (25%) of the bond amount for failure to sign the motion; (ii) fifty percent (50%) of the bond amount for failure to attach the required documentation; and (iii) not less than one hundred percent (100%) of the bond amount for the filing of fraudulent documentation. Sanctions awarded under this subdivision shall be docketed by the clerk of superior court as a

> civil judgment as provided in G.S. 1-234. The clerk of superior court shall remit the clear proceeds of the sanction to the county finance officer as provided in G.S. 115C-452. This subdivision shall not limit the criminal prosecution of any individual involved in the creation or filing of any fraudulent documentation.

N.C. Gen. Stat. § 15A-544.5(d)(8) (2019).

Section 15A-544.5(d)(8) addresses grounds for sanctions, a procedure for seeking sanctions, permissible sanctions, and satisfaction of any judgment relating to sanctions. By the plain language of the statute, sanctions may only be allowed if a motion to set aside is not signed, or the required documentation was not attached at the time of filing the motion to set aside.

In addition, Section 15A-544.5(d)(8) specifically states that "*If at the hearing the court determines that the motion to set aside* was not signed or that the documentation required to be attached pursuant to subdivision (1) . . ., the court may order monetary sanctions[.]" N.C. Gen. Stat. § 15A-544.5(d)(8) (emphasis added). Further, the statute only permits sanctions to be imposed if the motion to set aside is denied. *See* N.C. Gen. Stat. § 15A-544.5(d)(8) ("[I]f the court concludes that a sanction should be ordered, *in addition to ordering the denial of the motion to set aside*, *sanctions shall be imposed*" based on the amount of the bond (emphasis added)).

Read in its entirety, the plain language of Section 15A-544.5(d)(8) requires the trial court to first hold a hearing and make a determination regarding the underlying motion to set aside. "The trial court's authority to order sanctions against the surety who filed a motion to set aside is triggered [only after] the trial court" makes this initial determination. *State v. Lemus*, COA19-582, 2020 WL 1026548, at *4 (N.C. Ct. App. 2020) (unpublished). A trial court may only impose sanctions under Section 15A-544.5(d)(8) when the motion to set aside is denied, and by the plain language of this section, the trial court cannot order both that the forfeiture be set aside and that sanctions be imposed. Thus, the trial court abused its discretion when it granted the motion to set aside and imposed sanctions against Bail Agent.

Further, the Board failed to make a proper motion for sanctions. Pursuant to N.C. Gen. Stat. § 15A-544.5(d)(8), "[a] motion for sanctions and notice of the hearing thereof shall be served on the surety not later than 10 days before the time specified for the hearing." N.C. Gen. Stat.

§ 15A-544.5(d)(8). There is nothing in the record that indicates that the Board filed or served Bail Agent with a motion for sanctions and notice of the hearing 10 days prior to the hearing. Rather, the notation in the margin of the Board's objection to the motion to set aside merely reserved the right to file a motion for sanctions if Bail Agent provided supplemental documentation. No such motion is set forth in the record, and the Board's oral motion for sanctions is insufficient pursuant to the plain language of N.C. Gen. Stat. § 15A-544.5(d)(8).

Moreover, the sanction imposed by the trial court that prohibited Bail Agent from becoming surety on any future bonds in Jones County until the judgment was satisfied exceeded the scope of the trial court's authority. It is uncontroverted that a court cannot exercise authority not specifically prescribed in the bond forfeiture statutes. *See State v. Knight*, 255 N.C. App. 802, 806, 805 S.E.2d 751, 754 (2017) (emphasizing that the trial court's authority over bond forfeiture must be exercised in accordance with the relevant statutory provisions).

Allowable sanctions for failure to attach sufficient documentation to a motion to set aside are prescribed by N.C. Gen. Stat. § 15A-544.5(d)(8). Specifically, that section states that "sanctions shall be imposed as follows: . . . (ii) fifty percent (50%) of the bond amount for failure to attach the required documentation." N.C. Gen. Stat. § 15A-544.5(d)(8); *see also Cortez*, 229 N.C. App. at 269, 747 S.E.2d at 361 ("[I]f a surety fails to attach the required documentation to a motion to set aside . . . a court is now authorized and required by the General Assembly under subdivision (d)(8) to impose a sanction equal to fifty percent of the bond's amount if the court decides to impose monetary sanctions against a surety for such a failure."). Prohibiting Bail Agent from writing bonds until the judgment for sanctions was satisfied went beyond the trial court's authority as set forth in Section 15A-544.5, and therefore, the trial court abused its discretion.

In addition, the trial court assessed sanctions because the motion to set aside "contained insufficient documentation." Relying on *State v. Isaacs*, 261 N.C. App. 696, 821 S.E.2d 300 (2018), the trial court determined that "the Board is entitled, at the Court's discretion, to be reimbursed for attorney fees and expenses as a sanction to remedy any prejudice caused by the Surety's failure to attach sufficient evidence to its" motion to set aside the forfeiture.

An ACIS printout is a copy of an official court record. *See State v. Waycaster*, 375 N.C. 232, 243, 846 S.E.2d 688, 695 (2020) ("[T]he ACIS

database serves as a court record—albeit an electronic one.").[2] Here, Bail Agent attached an electronic copy of a court record which satisfies N.C. Gen. Stat. § 15A-544.5(b)(4) to his motion to set aside. The trial court failed to make findings of fact concerning why the motion to set aside contained insufficient documentation when an official court record was attached. Thus, the trial court abused its discretion when it sanctioned Bail Agent for failure to attach sufficient documentation to the motion to set aside.

Conclusion

For the reasons provided herein, the trial court abused its discretion when it sanctioned Bail Agent, and we reverse.

REVERSED.

Judges ARROWOOD and COLLINS concur.

---

2. ACIS is "maintained by the North Carolina Administrative Office of the Courts [and] provides the superior and district courts in North Carolina with accurate and timely criminal and infraction case information." *ACIS Citizen's Guide*, North Carolina Administrative Office of the Courts 5 (2017), https://www.nccourts.gov/assets/documents/publications/ACIS_Inquiry_RG.pdf?n5DVrlE3ODObw13mPuMpNs0uEecpTaBN. The system is used by courts to "create indexes, calendars and docket cases, notify individuals of case status and exceptions, and control the reporting of dispositions and final judgments for criminal cases." *ACIS Criminal Inquiry Module User Manual*, North Carolina Administrative Office of the Courts 8 (2010), https://www.nccourts.gov/assets/documents/publications/Criminal-Inquiry-Manual.pdf?fu6MNou7dLhkSYKnJ99hVDL4h2IjbzLh.

The primary users of the ACIS criminal module, are clerks of court, district attorneys, and magistrates. *Id.* at 6. The system is designed to "provide[] a complete history of all case related activity, and ultimately, disposition data." *Id.* at 8.

STATE v. McGAHA

[274 N.C. App. 232 (2020)]

STATE OF NORTH CAROLINA
v.
KAYLA SUE McGAHA

No. COA19-1108

Filed 3 November 2020

1. Appeal and Error—preservation of issues—driving while impaired—pretrial motion to suppress—failure to object at trial—failure to argue plain error

In a driving while impaired case, defendant failed to preserve for appellate review her argument that the trial court erroneously denied her pretrial motion to suppress for lack of reasonable suspicion for the stop where she did not object to the court's ruling, did not object to the evidence at trial, and failed to argue plain error on appeal. Therefore, the argument was dismissed.

2. Motor Vehicles—driving while impaired—motion to dismiss—sufficiency of the evidence

In a driving while impaired case, there was sufficient evidence to support a conclusion that defendant was under the influence of an impairing substance, and the trial court properly denied her motion to dismiss for insufficient evidence where the trooper testified that defendant's driving was erratic, she stumbled and staggered as she got out of the car, he smelled a moderate odor of alcohol on her breath, she spoke in slurred and mumbled speech, and she refused to submit to an intoxilyzer test.

3. Sentencing—driving while impaired—grossly aggravating factor—prior conviction within seven years—notice to defendant—waiver

Although the record on appeal in a driving while impaired case did not include evidence that the State gave notice of its intent to prove the grossly aggravating factor of a prior driving while impaired conviction within seven years of the date of the offense, as required by N.C.G.S. § 20-179(a1)(1), the trial court did not err by finding the grossly aggravating factor and imposing a Level Two sentence. Defendant waived her statutory right to notice where she testified to the prior conviction at trial, her counsel stipulated that she had the prior DWI, and she failed to object to the lack of notice at the sentencing hearing.

Appeal by Defendant from judgment entered 29 March 2019 by Judge Alan Thornburg in Henderson County Superior Court. Heard in the Court of Appeals 9 September 2020.

Attorney General Joshua H. Stein, by Associate Attorney General Jarrett W. McGowan, for the State-Appellee.

Charlotte Gail Blake for Defendant-Appellant.

COLLINS, Judge.

Kayla Sue McGaha ("Defendant") appeals from judgment entered upon the trial court's finding her guilty of impaired driving. Defendant argues that the trial court erred by denying her motion to suppress evidence, denying her motion to dismiss for insufficient evidence, and finding one grossly aggravating factor and accordingly imposing a Level Two sentence. We discern no error.

I. Procedural History

Defendant was arrested on 17 February 2017 and charged with driving while subject to an impairing substance and operating a motor vehicle with an open alcohol container. On 31 May 2018, Defendant pled guilty in district court to driving while impaired. The district court determined the State had proven beyond a reasonable doubt the grossly aggravating factor that Defendant "has been convicted of a prior offense involving impaired driving which conviction occurred within seven (7) years before the date of this offense." The district court imposed a Level Two sentence. Defendant noticed appeal to the superior court.

On 2 November 2018, Defendant filed a motion to suppress evidence in superior court. On 28 March 2019, Defendant pled not guilty to driving while impaired, waived her right to a jury trial, and requested a bench trial. Following a colloquy with Defendant, the superior court found Defendant's waiver to be made freely, voluntarily, and understandingly, and permitted the matter to be heard by the bench. The State voluntarily dismissed the open container charge. After hearing testimony and arguments on the suppression motion, the superior court denied the motion in open court and entered a corresponding written order on 5 April 2019.

At the close of the trial on 29 March 2019, the superior court found Defendant guilty of driving while impaired and found the grossly aggravating factor of a prior impaired driving conviction within seven years of the date of the offense. The superior court imposed a Level Two sentence of 12 months in prison, suspended the sentence, and placed

Defendant on 24 months' supervised probation. The superior court also ordered Defendant to abstain from consuming alcohol for 90 days, complete 240 hours of community service, and pay court costs. Defendant timely filed notice of appeal to this Court.

II. Factual Background

The State's evidence tended to show the following: At around 10:50 p.m. on 17 February 2017, State Trooper Tony Osteen of the North Carolina Highway Patrol was on preventative patrol travelling in an unmarked patrol car in the left-hand, eastbound lane of Upward Road, a four-lane road that connects U.S. Highway 176 to Interstate 26 to Howard Gap Road in Henderson County. Upward Road contains a grass median between the two lanes going in opposite directions, as well as turn lanes for accessing roads to the left, which start and stop between the grass median.

Osteen noticed a car approaching from behind, whose driver failed to dim the car's bright lights when the car was directly behind Osteen. After pulling over to the left into one of the turn lanes to let the driver pass, Osteen got back on Upward Road behind the car and followed it. Osteen noticed that the car was "weaving inside of its lane" and "going into . . . the right eastbound lane," and that it "crossed a dotted fog line," so he continued to follow it toward the intersection at Interstate 26. Just before reaching the intersection, the car got over into the leftmost of two turn lanes connecting to Interstate 26, then "jerked the wheel back and got into the lane that [the driver] had just left from and went straight through the intersection." When asked, "How would you characterize her driving?" Osteen responded, "It was definitely something that caught my eyes, somebody that could be impaired, driving erratic, weaving, unable to drive in a straight line." When they reached the next set of turn lanes, Osteen activated his lights and pulled the car over.

When Osteen approached the car to talk with the driver, whom he later identified as Defendant, he noticed an odor of alcohol coming from inside the car and asked Defendant to step out. When Defendant stepped out of the car, she staggered and smelled of alcohol. While Osteen conversed with Defendant to find out who she was, to obtain her driver's license, and to discuss why he stopped her, Osteen observed that she spoke in "slurred and mumbled speech" and had "a moderate odor of alcohol coming from her breath." When Osteen gave Defendant an Alco-Sensor test, Defendant's first blow into the device produced an error because it contained "too much moisture and was full of spit." Trooper Danny Odom, whom Osteen had called to assist, arrived at the scene and gave Defendant two Alco-Sensor tests using his portable

testing device, which both produced positive results. Osteen arrested Defendant and took her to the police station, where she refused to take an intoxilyzer test.

Osteen testified that it was his opinion that Defendant "had consumed a sufficient amount of impairing substance, which was alcohol, as to appreciably impair her mental and physical faculties." Osteen based his opinion on his observations of Defendant stumbling and staggering when she got out of the car, the moderate odor of alcohol on her breath, her mumbled and slurred speech, and her erratic driving.

III. Discussion

A. Motion to Suppress Evidence

[1] Defendant first argues that the trial court erred by denying her motion to suppress evidence. The State argues that Defendant failed to properly preserve the denial of the suppression motion for appellate review. Defendant's argument has not been preserved and thus is not properly before us.

"The law in this State is now well settled that 'a trial court's evidentiary ruling on a pretrial motion [to suppress] is *not* sufficient to preserve the issue of admissibility for appeal unless a defendant renews the objection during trial.' " *State v. Hargett*, 241 N.C. App. 121, 124, 772 S.E.2d 115, 119 (2015) (quoting *State v. Oglesby*, 361 N.C. 550, 554, 648 S.E.2d 819, 821 (2007)). Where a defendant fails to object when such evidence is offered at trial, appellate review is limited to plain error. *State v. Muhammad*, 186 N.C. App. 355, 364, 651 S.E.2d 569, 576 (2007); N.C. R. App. P. 10(a)(4). Plain error review is only available "when the judicial action questioned is specifically and distinctly contended to amount to plain error." N.C. R. App. P. 10(a)(4).

In this case, Defendant filed a motion to suppress evidence seized as a result of the stop, arguing that the officer lacked reasonable suspicion to stop her. After the trial court denied Defendant's motion but before the beginning of the trial, the State asked the trial court, "[S]ince you've already heard the evidence up to the stop[,] [w]ould it be acceptable to apply that to the trial portion here?" Defense counsel stated he "would have no issue just proceeding from here," and the trial court announced it would "incorporate that testimony into the trial testimony and consider that for purposes of the trial." Defendant did not object to the trial court's ruling and made no objections at trial. Thus, Defendant did not properly preserve the denial of her motion to suppress for review on appeal. *See Hargett*, 241 N.C. App. at 124, 772 S.E.2d at 119. Further,

because Defendant does not argue plain error on appeal, we do not review the denial of the motion for plain error. *See* N.C. R. App. P. 10(a)(4). Defendant's argument is dismissed.

B. Motion to Dismiss for Insufficient Evidence

[2] Defendant next argues that the trial court erred by denying her motion to dismiss based on insufficient evidence of the offense of driving while impaired.

This Court reviews a trial court's denial of a motion to dismiss for insufficient evidence de novo. *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007). Denial of a motion to dismiss in a criminal trial is proper if there is substantial evidence of the essential elements of the offense and that the defendant was the perpetrator. *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (2000). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980) (citations omitted). "In reviewing challenges to the sufficiency of the evidence, we must view the evidence in the light most favorable to the State, giving the State the benefit of all reasonable inferences." *Fritsch*, 351 N.C. at 378-79, 526 S.E.2d at 455 (citation omitted); *see State v. Rose*, 339 N.C. 172, 192, 451 S.E.2d 211, 223 (1994) (appellate court must resolve any contradictions in the State's favor).

"A person commits the offense of impaired driving if he drives any vehicle upon any highway, any street, or any public vehicular area within this State . . . [w]hile under the influence of an impairing substance . . . ." N.C. Gen. Stat. § 20-138.1(a)(1) (2019). "The opinion of a law enforcement officer . . . has consistently been held sufficient evidence of impairment, provided that it is not solely based on the odor of alcohol." *State v. Mark*, 154 N.C. App. 341, 346, 571 S.E.2d 867, 871 (2002) (citations omitted). Additionally, a defendant's refusal to submit to an intoxilyzer test is admissible as substantive evidence of impairment. *See* N.C. Gen. Stat. § 20-139.1(f) (2019).

Here, Osteen testified that he initially saw Defendant's car "weaving inside of its lane" and "going into . . . the right eastbound lane," and that it "crossed a dotted fog line," so he continued to follow it toward the intersection at Interstate 26. Just before reaching the intersection, Defendant's car got over into the leftmost of two turn lanes connecting to Interstate 26, then "jerked the wheel back and got into the lane that [the driver] had just left from and went straight through the intersection." Osteen thought that the driver of the car could be impaired due to the driver's "erratic" driving, weaving, and being "unable to drive in a straight line."

After Osteen pulled Defendant over and approached her car, he detected an odor of alcohol coming from inside the car. When Defendant stepped out of the car, she staggered and smelled of alcohol. While Osteen conversed with Defendant, he observed that she spoke in "slurred and mumbled speech" and had "a moderate odor of alcohol coming from her breath."

Osteen testified, "It is my opinion [Defendant] had consumed a sufficient amount of impairing substance, which was alcohol, as to appreciably impair her mental and physical faculties." Osteen further testified, "I based that on observing her stumbling, her staggering a little bit when she got out of the vehicle, moderate odor of alcohol on her breath, her mumbled and slurred speech, along with erratic driving." Because Osteen's opinion that Defendant was impaired was not based solely on the odor of alcohol, it was sufficient evidence of impairment. *See Mark*, 154 N.C. App. at 346, 571 S.E.2d at 871. Osteen also testified that Defendant refused to submit to an intoxilyzer test at the police station, which was admissible evidence of impairment. *See* N.C. Gen. Stat. § 20-139.1(f).

Defendant argues that there is conflicting testimony about why she refused to take the intoxilyzer test at the police station, asserting that she has a heart condition that caused her to be unable to blow any more after they arrived at the police station. However, in viewing the evidence in the light most favorable to the State and giving the State the benefit of all reasonable inferences, *see Fritsch*, 351 N.C. at 378-79, 526 S.E.2d at 455, we resolve any contradiction in the State's favor, *see Rose*, 339 N.C. at 192, 451 S.E.2d at 223.

Viewed in the light most favorable to the State, the evidence was sufficient to support the conclusion that Defendant was "under the influence of an impairing substance" at the time of her arrest. N.C. Gen. Stat. § 20-138.1(a)(1). The trial court properly denied Defendant's motion to dismiss.

C. Grossly Aggravating Factor

[3] Defendant finally argues that the trial court erred by finding the grossly aggravating factor of a prior driving while impaired conviction within seven years of the date of the offense, where the State failed to notify Defendant of its intent to prove the aggravating factor for sentencing purposes.

We first address the State's motion made pursuant to North Carolina Rule of Appellate Procedure 9(b)(5)(a) to supplement the record, or

alternatively pursuant to Rule 9(b)(5)(b) to remand to the trial court to allow the trial court to correct the record, with a Notice of Grossly Aggravating and Aggravating Factors (DWI) form the State alleges was served on Defendant's attorney on 17 September 2018.

North Carolina Rule of Appellate Procedure 9(b)(5)(a) allows an appellee, in certain circumstances, to "supplement the record on appeal with any items that could otherwise have been included pursuant to this Rule 9." N.C. R. App. P. 9(b)(5)(a). In addition to an enumerated list of items, Rule 9 provides that the record shall contain "copies of all other papers filed and statements of all other proceedings had in the trial courts which are necessary for an understanding of all issues presented on appeal." N.C. R. App. P. 9(a)(3)(i). Rule 9(b)(5)(b) states in pertinent part: "On motion of any party or on its own initiative, the appellate court may order additional portions of a trial court record or transcript sent up and added to the record on appeal."

In this case, the State admits in its motion that the Notice of Grossly Aggravating and Aggravating Factors (DWI) form "was neither filed nor presented to the trial court." Accordingly, the form could not have been included in the record pursuant to Rule 9 and could not supplement the record on appeal pursuant to Rule 9(b)(5)(a). Additionally, as the proffered form was not part of the trial court's record in this case, it cannot be added to the record on appeal pursuant to Rule 9(b)(5)(b). We therefore deny the State's motion and do not consider the proffered form.

"Alleged statutory errors are questions of law and, as such, are reviewed *de novo*. Under *de novo* review, the appellate court considers the matter anew and freely substitutes its own judgment for that of the lower court." *State v. Hughes*, 265 N.C. App. 80, 81-82, 827 S.E.2d 318, 320 (2019) (citations omitted).

Pursuant to N.C. Gen. Stat. § 20-179(a1)(1), "[i]f the defendant appeals to superior court, and the State intends to use one or more aggravating factors under subsections (c) or (d) of this section, the State must provide the defendant with notice of its intent." N.C. Gen. Stat. § 20-179(a1)(1) (2019). Under subsection (c) of this section, a prior conviction for an offense involving impaired driving is a grossly aggravating factor if "[t]he conviction occurred within seven years before the date of the offense for which the defendant is being sentenced." *Id.* at § 20-179(c)(1)(a). A defendant's right to notice of the State's intent to prove a prior conviction is a statutory right, not a constitutional one. *State v. Williams*, 248 N.C. App. 112, 116-17, 786 S.E.2d 419, 423-24 (2016). *See Blakely v. Washington*, 542 U.S. 296, 301 (2004) ("Other than

the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." (quoting *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000)). Thus, "[a] defendant's Sixth Amendment right to 'reasonable notice' is not violated 'where the State provides no prior notice that it seeks an enhanced sentence based on the fact of prior conviction.' " *Williams*, 248 N.C. App. at 117, 786 S.E.2d at 423-24 (citation omitted). The statutorily required notice of a prior conviction under N.C. Gen. Stat. § 20-179(a1)(1) can be waived.[1] *See*, *e.g.*, *Hughes*, 265 N.C. App. at 81, 84, 827 S.E.2d at 321-22 (where the State failed to provide defendant notice of its intent to use aggravating factors under N.C. Gen. Stat. § 20-179(a1)(1), "and the record d[id] not indicate that [d]efendant waived his right to receive such notice," the trial court committed prejudicial error by applying the aggravating factors).

Here, Defendant admitted to her 2012 driving while impaired conviction when questioned on cross-examination during the trial on the merits. At sentencing, the State offered, "[Defendant] has had one prior conviction of DWI in the last seven years making her a Level II for sentencing, we believe." Defense counsel stipulated that "Defendant did have the prior DWI," but asked the court to "take into consideration everything that you heard today and everything that you heard from [Defendant] with her condition and everything like that in terms of sentencing." The court then announced, "The Court finds that grossly aggravating factor No. 1A, that the defendant has been convicted of a prior offense involving impaired driving, which conviction occurred within seven years before the date of this offense. Therefore, the defendant is a Level II for punishment with one grossly aggravating factor present." Defendant did not object.

Defendant admitted to her prior conviction, her counsel stipulated to Defendant's prior conviction, and at no time during sentencing did Defendant object to the consideration of her prior conviction as an aggravating factor in determining her punishment level for sentencing. Defendant's admission and her counsel's stipulation, coupled with Defendant's failure to object to lack of notice at the sentencing hearing, operated as a waiver of her statutory right to notice.

Defendant relies upon *Hughes*, *State v. Geisslercrain*, 233 N.C. App. 186, 756 S.E.2d 92 (2014), and *State v. Reeves*, 218 N.C. App. 570, 721

1. Unlike N.C. Gen. Stat. § 15A-1340.16, our felony sentencing statute that contains an analogous notice provision, N.C. Gen. Stat. § 20-179 does not require admissions to the existence of an aggravating factor to be consistent with N.C. Gen. Stat. § 15A-1022.1, which requires the trial court to address the defendant personally regarding an admission.

S.E.2d 317 (2012), to support her argument that Defendant's sentence should be vacated and remanded for lack of notice. However, unlike in the present case, the facts in those cases do not indicate that defendants waived notice by admitting the aggravating factor and failing to object based on a lack of notice of the State's intent to use the factor. The defendant in *Hughes* specifically objected to the lack of notice, and this Court stated that the record before it "does not indicate that Defendant waived his right to receive such notice." 265 N.C. App. at 81, 84, 827 S.E.2d at 320, 322.

The trial court did not err by finding the grossly aggravating factor of a prior driving while impaired conviction within seven years of the date of the offense and imposing a Level Two sentence. Defendant's argument is overruled.

IV. Conclusion

The trial court did not err by denying Defendant's motion to dismiss for insufficient evidence. The trial court did not err in sentencing Defendant by finding a grossly aggravating factor based on a prior driving while impaired conviction because Defendant waived notice.

NO ERROR.

Judges STROUD and MURPHY concur.

STATE OF NORTH CAROLINA
v.
LORRIE LASHANN RAY

No. COA20-132

Filed 3 November 2020

1. Appeal and Error—preservation of issues—failure to object—sentencing—claim that sentence invalid as a matter of law

Where defendant was convicted of insurance fraud and obtaining property by false pretenses and did not object to her sentence at trial, her arguments that the trial court erred by imposing sentences on both offenses based on the same misrepresentation and improperly delegated authority to her probation officer by failing to set a completion deadline for the active term of her split sentence were reviewable on appeal. Because defendant alleged the trial court

erred by imposing a sentence that was invalid as a matter of law, her arguments were preserved for appellate review despite her failure to object on that basis at sentencing.

2. Sentencing—insurance fraud—obtaining property by false pretenses—arising from same misrepresentation

Where defendant was convicted of both insurance fraud and obtaining property by false pretenses based on the same misrepresentation to the insurance company, the trial court did not err in sentencing defendant on both offenses because the language, subject, and history of the statutes involved showed a legislative intent to impose multiple punishments. Each offense required an element not required by the other, each offense addressed a violation of a separate and distinct social norm, and the Court of Appeals had sustained sentencing for convictions of both insurance fraud and obtaining property by false pretenses in numerous cases over the years, and if that had not been the intent of the legislature, it could have addressed the matter.

3. Sentencing—probation—split sentence—failure to set completion deadline for active sentence

Where defendant was convicted of insurance fraud and obtaining property by false pretenses and the trial court sentenced her to serve 24 months of supervised probation with a condition that she serve a 60-day active sentence in two 30-day terms as scheduled by her probation officer, the trial court did not err or unlawfully delegate its authority to the probation officer by failing to set a completion deadline for the active sentence. The trial court properly determined the time and intervals within the period of probation (the two thirty-day periods) as allowed by N.C.G.S. § 15A-1351(a), and the completion date was set by statute—the end of the probationary period or no more than two years from the date of defendant's conviction.

Appeal by Defendant from judgment entered 28 August 2019 by Judge Gale M. Adams in Harnett County Superior Court. Heard in the Court of Appeals 6 October 2020.

Attorney General Joshua H. Stein, by Assistant Attorney General Ronald D. Williams, II, for the State-Appellee.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Candace Washington, for Defendant-Appellant.

COLLINS, Judge.

Defendant Lorrie Lashann Ray appeals from judgment entered upon guilty verdicts for insurance fraud and obtaining property by false pretenses. Defendant argues that the trial court erred by (1) imposing a sentence based on both offenses and (2) improperly delegating authority to Defendant's probation officer by failing to set a completion deadline for the active term of the sentence as a condition of special probation. We discern no error.

I. Procedural History

Defendant was indicted on charges of insurance fraud, obtaining property by false pretenses, and attempting to obtain property by false pretenses. At trial, the State voluntarily dismissed the attempt charge. The jury found Defendant guilty of insurance fraud and obtaining property by false pretenses. The trial court consolidated the convictions for judgment and sentenced Defendant to 10 to 21 months of imprisonment, suspended for 24 months of supervised probation. As a condition of probation, the trial court ordered Defendant to serve a 60-day active term.

Defendant gave notice of appeal in open court.

II. Factual Background

The State's evidence tended to show the following: Defendant's home in Dunn, North Carolina, was damaged in the fall of 2016 by Hurricane Matthew. Defendant filed a claim on 24 October 2016 with her home insurance company, Universal Property and Casualty Insurance Company ("Insurer"). Defendant claimed her roof, windows, doors, porch, and electronics were damaged; there were leaks throughout the home due to the roof damage; she was living in her barn; and she lost all of the food in her refrigerator due to spoilage. An insurance adjustor inspected the home on 2 November and completed a report the next day, which included photographs and stated that Hurricane Matthew caused wind damage to the exterior and interior of the home estimated at $1,578.99, that the house was habitable, and that living expenses would not be expected. The insurance adjustor issued a final report on 21 November showing the gross claim of $1,578.99 less the deductible, resulting in an amount payable to Defendant of $452.99. The Insurer issued a check for $452.99 to Defendant.

Defendant contacted the Insurer on 6 December by phone, disputing the amount awarded on her claim and requesting that the Insurer perform another home inspection. The next day, Defendant submitted

to the Insurer an inventory of food loss totaling $1,350. On 21 December, Defendant submitted estimates for roof repairs for $6,240, window repairs for $1,520, and a door repair for $427. Defendant also submitted (1) a handwritten lease agreement signed by Defendant and her stepfather, Robert McEachin, stating that Defendant would pay $100 per day to McEachin to stay in his home; and (2) handwritten documents purporting to be 76 paid daily receipts beginning 11 October 2016 for $100 each, signed by McEachin and stating that Defendant was living in his home. Twice in January 2017, Defendant contacted the Insurer claiming reimbursement for living expenses in the amount of $8,300. Defendant faxed the handwritten lease agreement and receipts totaling $8,300, explained that she was paying cash to McEachin, and gave the Insurer McEachin's phone number. On 1 February, Defendant called the Insurer explaining that she was going to be evicted from where she was staying and would need to spend $150 per night on a hotel.

After reviewing Defendant's claims, the Insurer made three additional payments to Defendant: $5,608.01 for additional home repairs; $500 for spoiled food; and $2,000 for living expenses, based on 20 days under the lease agreement that Defendant provided to the Insurer.

Defendant called McEachin and told him that the Insurer was going to call him to ask him a few questions, and that "all [he] had to do was just tell them yes." McEachin received a phone call from the Insurer but did not answer or return it. A representative of the Insurer visited McEachin at his home; showed him the receipts that Defendant had submitted; asked him if he had signed them, to which he replied "no"; and had him sign his name on a piece of paper. McEachin told the insurance representative that he did not have a lease agreement with Defendant and that Defendant had not stayed with him between October 2016 and January 2017. McEachin testified at trial that he did not write or sign the purported receipts and that Defendant did not stay in his house.

III. Discussion

[1] Defendant argues that the trial court erred by sentencing her for both obtaining property by false pretenses and insurance fraud for the same alleged misrepresentation. Defendant also argues that the trial court improperly delegated its authority to Defendant's probation officer by failing to set a completion deadline for the active term of Defendant's split sentence.

We reject the State's argument that these issues are not properly preserved for appellate review. When a defendant alleges that a trial court erred by imposing a sentence that is invalid as a matter of law,

the defendant's argument is preserved for appellate review, even if the defendant failed to object on this basis at sentencing. *See* N.C. Gen. Stat. § 15A-1446(d)(18) (2019); *State v. Meadows*, 371 N.C. 742, 747, 821 S.E.2d 402, 406 (2018) ("Although this Court has held several subdivisions of subsection 15A-1446(d) to be unconstitutional encroachments on the rulemaking authority of the Court, subdivision (18) is not one of them."); *State v. Mumford*, 364 N.C. 394, 403, 699 S.E.2d 911, 917 (2010) ("[N.C. Gen. Stat. § 15A-1446(d)(18)] does not conflict with any specific provision in our appellate rules and operates as a 'rule or law' under [North Carolina Rule of Appellate Procedure] 10(a)(1), which permits review of this issue").[1]

A. Sentencing Based on Both Convictions

[2] Defendant contends that the trial court erred by sentencing her based on both the conviction for obtaining property by false pretenses and the conviction for insurance fraud, arising from the same alleged misrepresentation. Defendant argues that the "General Assembly did not intend to doubly punish defendants for making a single misrepresentation merely because the victim happened to be an insurance company."

"Whether . . . multiple punishments may be imposed when a defendant, in a single trial, is convicted of multiple offenses when some are fully, factually embraced within others is to be determined on the basis of legislative intent." *State v. Gardner*, 315 N.C. 444, 460, 340 S.E.2d 701, 712 (1986). Where the legislature "clearly expresses its intent to proscribe and punish exactly the same conduct under two separate statutes, a trial court *in a single trial* may impose cumulative punishments under the statutes." *State v. Pipkins*, 337 N.C. 431, 433-34, 446 S.E.2d 360, 362 (1994) (citations omitted). "Whether multiple punishments were imposed contrary to legislative intent presents a question of law, reviewed *de novo* by this Court." *State v. Hendricksen*, 257 N.C. App. 345, 347, 809 S.E.2d 391, 393 (2018) (citations omitted).

"The traditional means of determining the intent of the legislature where the concern is . . . one of multiple punishments for two convictions

1. Embedded within the discussion in Defendant's appellate brief of her challenge to sentencing is a separate argument that legislative intent bars two *convictions* in this case. Defendant failed to preserve this argument for appellate review by failing to object to the jury instruction on both charges at trial. *See* N.C. R. App. P. 10(a)(1). Further, we decline to grant Defendant's request that we invoke Rule 2 in order to review this argument. *See* N.C. R. App. P. 2. Declining review of this argument does not result in manifest injustice in this case because we would uphold both convictions for similar reasons we uphold the trial court's sentence, as discussed below.

in the same trial include the examination of the subject, language, and history of the statutes." *Gardner*, 315 N.C. at 461, 340 S.E.2d at 712.

With regard to *language*, "[t]he legislative intent of the statutes defining the offenses in question can be extrapolated from the provisions of each statute." *State v. Banks*, 367 N.C. 652, 657, 766 S.E.2d 334, 338 (2014) (citations omitted). "When a statute is unambiguous, this Court will give effect to the plain meaning of the words without resorting to judicial construction." *Id.* (citations omitted).

The elements of insurance fraud are: "(1) a defendant presents a statement for a claim under an insurance policy; (2) that statement contained false or misleading information; (3) the defendant knows the statement is false or misleading; and, (4) the defendant acted with the intent to defraud." *State v. Koke*, 264 N.C. App. 101, 107, 824 S.E.2d 887, 892 (2019) (citing N.C. Gen. Stat. § 58-2-161(b)) (other citation omitted). The elements of obtaining property by false pretenses are: "(1) A false representation of a past or subsisting fact or a future fulfillment or event, (2) which is calculated and intended to deceive, (3) which does in fact deceive, and (4) by which the defendant obtains or attempts to obtain anything of value from another person." *State v. Saunders*, 126 N.C. App. 524, 528, 485 S.E.2d 853, 855-56 (1997) (brackets and citation omitted). *See* N.C. Gen. Stat. § 14-100(a) (2019).

While both offenses require a misrepresentation intended to deceive, they each require an element not required by the other. Insurance fraud requires proving that the defendant presented a statement in support of a claim for payment under an insurance policy; obtaining property by false pretenses requires proving that the defendant's misrepresentation did in fact deceive. Based on the separate and distinct elements that must be proven, the legislature clearly expressed its intent to proscribe and punish a misrepresentation intended to deceive under both statutes. *See Banks*, 367 N.C. at 659, 766 S.E.2d at 339 (Given the separate and distinct elements of second-degree rape and statutory rape, "it is clear that the legislature intended to separately punish the act of intercourse with a victim who, because of her age, is unable to consent to the act, and the act of intercourse with a victim who, because of a mental disability or mental incapacity, is unable to consent to the act" (citations omitted)).

With regard to the *subject* of the two crimes, "it is clear that the conduct of the defendant is violative of two separate and distinct social norms." *Gardner*, 315 N.C. at 461, 340 S.E.2d at 712. Where obtaining property by false pretenses is generally likely to harm a single victim, a broader class of victims is harmed by insurance fraud. Fraud perpetrated

on insurers through the submission of false claims increases insurers' cost of doing business—beyond simply the financial loss of having paid an insured a finite amount on a fraudulent claim—because it requires insurers to investigate fraudulent claims and establish ongoing processes for avoiding future fraudulent claims. These costs must be passed on to consumers of insurance through increased premiums. Hence, there are policy concerns unique to insurance fraud that the legislature seeks to achieve by criminalizing this activity.

Finally, regarding the *history* of the treatment of the two crimes for sentencing purposes, this Court has sustained sentencing for convictions of obtaining property by false pretenses and insurance fraud arising from the same misrepresentation. *See*, *e.g.*, *Koke*, 264 N.C. App. at 105, 824 S.E.2d at 890; *State v. Locklear*, 259 N.C. App. 374, 816 S.E.2d 197 (2018); *State v. Pittman*, 219 N.C. App. 512, 725 S.E.2d 25 (2012). "Had conviction and punishment of both crimes in a single trial not been intended by our legislature, it could have addressed the matter during the course of these many years." *Gardner*, 315 N.C. at 462-63, 340 S.E.2d at 713.

Accordingly, because our legislature has expressed its intent to proscribe and punish the same misrepresentation under both insurance fraud and obtaining property by false pretenses, the trial court did not err by consolidating both Class H felony convictions for judgment and sentencing Defendant in the high presumptive range for one Class H felony.

B. Active Term of Sentence

[3] Defendant argues that the trial court improperly delegated its authority to Defendant's probation officer by failing to set a completion deadline for the active term of Defendant's split sentence. Defendant contends that this delegation of authority is not permitted by N.C. Gen. Stat. § 15A-1351(a).

Although "[a] challenge to a trial court's decision to impose a condition of probation is reviewed on appeal using an abuse of discretion standard," *State v. Chadwick*, 843 S.E.2d 263, 264 (N.C. Ct. App. 2020) (citation omitted), "[a]n alleged error in statutory interpretation is an error of law, and thus our standard of review for this question is *de novo*," *State v. Wainwright*, 240 N.C. App. 77, 79, 770 S.E.2d 99, 102 (2015) (citation omitted).

Under North Carolina's criminal statutes, a trial court may sentence a defendant to special probation as a form of intermediate punishment, under certain circumstances. N.C. Gen. Stat. § 15A-1351(a) (2019). When doing so,

> the court may suspend the term of imprisonment and place the defendant on probation . . . and in addition require that the defendant submit to a period or periods of imprisonment . . . at whatever time or intervals within the period of probation, consecutive or nonconsecutive, the court determines. . . . [T]he total of all periods of confinement imposed as an incident of special probation, but not including an activated suspended sentence, may not exceed one-fourth the maximum sentence of imprisonment imposed for the offense, and no confinement other than an activated suspended sentence may be required beyond two years of conviction.

Id.

Thus, under the statute, a period or periods of imprisonment must be "within the period of probation," and no portion of this imprisonment "may be required beyond two years of conviction." *Id.* Accordingly, the statute itself sets the outer limit, or completion deadline, of an active term as a condition of special probation as the end of the period of probation or two years after the date of conviction, whichever comes first.

In this case, the trial court sentenced Defendant to 10 to 21 months of imprisonment, and suspended that sentence for 24 months of supervised probation. As a condition of probation, the trial court ordered Defendant to serve a 60-day active term. On the Judgment Suspending Sentence form (AOC-CR-603D), under Intermediate Punishments, the trial court selected Special Probation and checked box A, ordering an active term of 60 days to be served in the custody of the Sheriff of Harnett County. The trial court also checked box H, labeled "Other," and inserted the following: "TO SERVE 30 DAYS AT ONE TIME AND 30 DAYS AT ANOTHER TIME AS SCHEDULED BY PROBATION."

The trial court appropriately determined the "intervals within the period of probation" as two thirty-day periods, and the completion date is set by statute as 27 August 2021—which, in this case, is both the end of the two-year probationary period and two years from the date of conviction.

IV. Conclusion

We conclude that the trial court did not err by imposing a sentence based on convictions for both obtaining property by false pretenses and insurance fraud based on the same misrepresentation, and the trial

court did not err by failing to set a completion deadline for the active term of Defendant's sentence as a condition of special probation.

NO ERROR.

Judges BRYANT and TYSON concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 3 NOVEMBER 2020)

IN RE L.J.B. No. 19-1130	Rockingham (19JA41)	Vacated and Remanded
JUSTICE v. DEACON JONES AUTO. OF CLINTON, LLC No. 20-76	Wayne (19CVD1183)	Dismissed
LARUE v. LARUE No. 20-277	Henderson (15CVD590)	Affirmed
REECE v. HOLT No. 19-986	Mecklenburg (18CVD23070) (19CVD9282)	Affirmed
RICHARDSON v. N.C. STATE BUREAU OF INVESTIGATION No. 18-765	Office of Admin. Hearings (17OSP4570)	Vacated and Remanded
SPECTOR v. PORTFOLIO RECOVERY ASSOCS., LLC No. 20-13	Mecklenburg (18CVS18068)	Affirmed
STATE v. ALSTON No. 19-346	Orange (15CRS53533) (18CRS43)	No Error
STATE v. BARBER No. 20-234	Guilford (16CRS91317)	No error with respect to trial; dismissed without prejudice as to claim of ineffective assistance of counsel.
STATE v. BORUM No. 19-1022	Mecklenburg (16CRS236159-60)	No Error at Trial; Remanded for resentencing.
STATE v. BROOM No. 19-888	Mecklenburg (18CRS215623) (18CRS215626)	No Error
STATE v. BUENO No. 19-1144	Stanly (19CRS50047-48)	No Error
STATE v. BUTLER No. 19-939	Cabarrus (14CRS54781)	No Error

STATE v. CROMARTIE No. 20-96	New Hanover (17CRS54688) (19CRS1347)	No Error in Part; Dismissed in Part
STATE v. DANCY No. 20-70	Wake (16CRS204952) (16CRS204953)	No Error
STATE v. DEL CASTILLO CAICEDO No. 19-643	Wake (17CRS719934)	Affirmed
STATE v. DOTSON No. 19-1003	Haywood (17CRS000809) (17CRS052010) (17CRS052011) (17CRS052012) (17CRS052013)	No Error
STATE v. JOHNSON No. 20-116	Forsyth (16CRS2150-51) (16CRS50570-71)	Vacated and remanded in part.
STATE v. LECKNER No. 19-1109	Haywood (17CRS963)	No Error
STATE v. MATHIS No. 19-1062	Iredell (18CRS2215) (18CRS51629)	No Error in Part; Dismissed without Prejudice in Part
STATE v. McPETERS No. 19-687	Mitchell (17CRS187) (17CRS50365)	No Error
STATE v. PRICE No. 20-98	Durham (15CRS59081) (17CRS50989)	Vacated and Remanded
STATE v. SMITH No. 20-226	Scotland (16CRS51589)	NO PLAIN ERROR.
STATE v. WHISNANT No. 20-66	Catawba (16CRS52677)	No Error in Part; Reversed in Part
STATE v. WHITE No. 20-189	Forsyth (14CRS54011-12) (14CRS54014)	No Error
SUN v. McDONALD No. 19-1068	Robeson (17CVS2156)	Dismissed

COMMERCIAL PRINTING COMPANY
PRINTERS TO THE SUPREME COURT AND THE COURT OF APPEALS